APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-5420

THEODORE PAYTON
Appellant,

—vs.—

NEW YORK
Appellee.

No. 78-5421

OBIE RIDDICK
Appellant,

—vs.—

NEW YORK
Appellee.

APPEALS FROM THE NEW YORK COURT OF APPEALS

NO. 78-5420 FILED SEPTEMBER 19, 1978
NO. 78-5421 FILED SEPTEMBER 19, 1978
PROBABLE JURISDICTION NOTED DECEMBER 11, 1978

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Chronological List of Important Dates

Payton v. *New York* (No. 78-5420)

March 30, 1970: Indictment filed.

April 5, 1970: Appellant arraigned in Supreme Court, New York County—enters plea of not guilty.

April 14, 1970: Appellant committed for mental examination pursuant to §§ 658, 870 of New York Code of Criminal Procedure.

June 9, 1970: Appellant committed to custody of Commissioner of Mental Hygiene by order of court.

April 5, 1972: Appellant re-arraigned on indictment and enters plea of not guilty.

May 16, 1974: Hearing on motion to suppress physical evidence.

June 4, 1974: Motion to suppress .30 caliber shell casing denied.

June 21, 1974: Appellant convicted after jury trial of murder (count one of indictment).

October 15, 1974: Hearing held on appellant's motion to set aside verdict.

October 29, 1974: Motion to set aside verdict denied; appellant sentenced to 15 years to life imprisonment.

December 16, 1976: Judgment of conviction unanimously affirmed without opinion by Appellate Division, First Department.

July 11, 1978: Conviction affirmed by New York Court of Appeals by vote of 4-3.

September 12, 1978: Notice of Appeal to U.S. Supreme Court filed.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[Filed March 30, 1970]

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

THEODORE PAYTON, DEFENDANT

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of MURDER, committed as follows:

The defendant, in the County of New York, on or about January 12, 1970, while engaged in the commission of the crime of Robbery and in the course of such crime, and in the furtherance thereof, and in immediate flight therefrom, caused the death of Roberto Carasas not a participant in the crime, by shooting him with a rifle.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of MURDER, committed as follows:

The defendant, in the County of New York, on or about January 12, 1970, with intent to cause the death of Roberto Carasas caused the death of Roberto Carasas by shooting him with a rifle.

FRANK S. HOGAN
District Attorney

SUPREME COURT, NEW YORK COUNTY

EXCERPTS FROM SUPPRESSION
HEARING TRANSCRIPT

[107] Colloquy

* * * *

THE COURT: Mr. Payton, we're going to complete this hearing today on the illegal search and seizure; I'll come down on your application for bail before twenty-four hours have elapsed. I want to read the other reports.

Is counsel here in the other case?

(Discussion off the record.)

THE COURT: We're going to take testimony on the suppression of tangible evidence, aren't we?

MR. JACOBS: Judge, as I have already submitted in my affidavit, I've stipulated to the fact that the search of the defendant's apartment was [108] illegal.

(Discussion off the record, at the bench, between the Court and attorneys in another matter.)

THE COURT: I have just inquired, while Mr. Payton was here and the reporter was here, on the motion to suppress tangible evidence I understood we were waiting for Detective Malfer to appear, but—

MR. JACOBS: He has not returned yet, Judge. But to expedite matters, I submitted a memorandum of law to the Court, and I gave a copy to Mr. Katz earlier, and the People are perfectly willing to concede that the search of the defendant's apartment on January 15th, 1970, 7:30 in the morning, was illegal.

The only piece of evidence that the People believe should not be suppressed in this case, as I put in the memorandum of law, is the Winchester shell which was found in plain view.

I've stated to the Court, I have already told—

THE COURT: Is it illegal because no warrant was obtained?

MR. JACOBS: That is correct, Judge.

[109] The People contend that the entry into the apart-

ment was legal, and I have already cited the appropriate authorities in my memorandum of law.

THE COURT: Wait a minute now.

The entry was legal.

MR. JACOBS: That's correct.

THE COURT: But the search was illegal.

MR. JACOBS: That is correct.

THE COURT: And the entry you maintain was legal because of provisions of C.P.L. 140.15.

MR. JACOBS: That is correct. And the appropriate cases under it, and the other cases that I have cited.

THE COURT: What cases are appropriate under it?

MR. JACOBS: Harris vs. United States.

THE COURT: Hold it just a minute.

The C.P.L. to which you make reference didn't come into effect until 1971.

MR. JACOBS: I put that in my memorandum, Judge. I'm aware of that.

THE COURT: Yes.

MR. JACOBS: And all I think that the C.P.L. [110] did in 1971 was codify the prior case law which I cite, and I believe that the Code of Criminal Procedure had appropriate sections similar to Section 140.15.

THE COURT: All right.

MR. JACOBS: I think I've stated that in my memorandum of law as well.

THE COURT: Okay.

MR. JACOBS: There's no question that the evidence that was found in bureau drawers and in the closet was illegally obtained. I'm perfectly willing to concede that, and I do so in my memorandum of law. There's no question about that.

THE COURT: Well, then on your concession you would—

MR. JACOBS: Items A and B.

THE COURT: —you would say that the Winchester —the motion then to suppress the Winchester shotgun and the fourteen shells found in the closet should be granted.

MR. JACOBS: That's correct.

THE COURT: All right.

That's by concession.

[111] MR. JACOBS: That's correct.

THE COURT: All right.

And you also concede that the three photos of the defendant in a ski mask and a bill of sale for the shotgun which was found in the drawer should also be suppressed.

MR. JACOBS: That is correct.

THE COURT: That takes care of two items.

Now, there's a third item, a .30 caliber Winchester casing which was found on top of the stereo in the living room in plain view, and you argue that that item should not be suppressed.

MR. JACOBS: That is correct.

THE COURT: All right, I'll hear you on it.

MR. JACOBS: Your Honor, I think we're dealing here with a very, very particular point of law, and I think it is a matter of law for the Court to determine.

It's the People's position that a police officer has a legal right to break into someone's apartment to look for that person if that person has committed a felony. I think the cases and section that I pointed out so hold. [112] However, in breaking into that apartment without a search warrant, the police are limited to what they can do, what they cannot do.

THE COURT: You mean they can just pick up the suspect and nothing more?

MR. JACOBS: That is correct, with one exception.

There's no question without a search warrant they cannot search the apartment. People are conceding that here.

However, if items of evidence are found in plain view the police officers cannot close their eyes to that, and I think have a perfectly legal right at that point to seize those items in plain view.

THE COURT: Now, what authorities do you have to support that position?

MR. JACOBS: I cited four cases in my memorandum of law, your Honor.

THE COURT: Haris vs. The United States, People vs. Gallmon,—

MR. JACOBS: No, those cases were of the entry, your Honor.

THE COURT: I beg your pardon.

[113] People vs. Ball, People vs. Boone, each reported in 41 App. Div. 2d; and People vs. Neulist, 72 Misc. 2d; and People vs. Avasino, 71 Misc. 2d.

Do defense counsel have a copy of this?

MR. KATZ: Yes, we were handed it this morning.

THE COURT: Okay.

MR. JACOBS: What the People are arguing, your Honor, is that there is an exception to the rule that when an entry is made for the purpose of finding a suspected felon, that they cannot search a premises; however, if contraband or evidence is in plain view the police officers have a right to seize that property.

And I think that the rationale of the cases that I've cited would be quite apparent to the Court.

In breaking into the apartment and the defendant not being there, the police officers see a .30 caliber Winchester shell in their plain view. Now, at that particular time the police officers knew on January 12th, 1970, that a .30 caliber Winchester rifle was the weapon used in the murder. [114] Now for the police officers to turn around and leave that apartment and not take the shell certainly I don't feel would be proper. There would be no point in obtaining a search warrant at that point; they are already there on the premises and the evidence is right before them.

THE COURT: I suppose one of the issues that I would have to decide is whether or not the assertion that the shell was where the police officers said it was was credible.

MR. JACOBS: Well, Judge, I think the People have been more than candid this morning.

THE COURT: No, no. Excuse me.

MR. JACOBS: I'm aware of that.

THE COURT: I'm not being critical, but—

MR. JACOBS: If Mr. Katz and Mr. Burns want Detective Malfer to get on the stand—I think I've gone

more so than most prosecutors would do in conceding this illegal search in certain items; I'm certain most prosecutors wouldn't do that. I felt that it would be fruitless to stand up here and try to argue the point. I had a particular point of law—

THE COURT: Mr. Jacobs, I've always found [115] you to be highly professional in everything you did when you appeared before me.

MR. JACOBS: Thank you.

THE COURT: Even in cases where I ruled against you.

MR. JACOBS: And there have been many.

If Mr. Katz and Mr. Burns would want Detective Malfer to get on the stand and say that the Winchester was found—that the Winchester casing was in plain view on the TV set, well, he should be back shortly and we can have him do that. I thought we can move this thing along.

THE COURT: I thought it could be decided merely as an issue of law upon the stipulated facts.

MR. JACOBS: That's correct, your Honor. I think it is a fairly technical point, and I'm willing to stipulate to it. If defense counsel want Detective Malfer to say that on the stand—

THE COURT: What is your wish in the matter, Mr. Katz, do you want to take testimony here?

MR. KATZ: Well, your Honor, it goes beyond the question of whether the item C set forth in the District Attorney's memorandum, namely, the [116] .30 caliber Winchester casing, should be suppressed. As the Court is aware, our motion goes beyond the mere suppression of physical evidence. It goes to the question of whether the statements, whether inculpatory or exculpatory, allegedly made by defendant, should be suppressed because of taint.

THE COURT: Well, assuming that the search was illegal.

MR. KATZ: Yes.

THE COURT: Which is the concession of the district attorney with respect to items A and B.

MR. KATZ: Yes.

THE COURT: Couldn't you argue—wouldn't you then be able to argue from that concession, that the police would not be able to question Mr. Payton but for that illegal search?

MR. KATZ: Yes.

THE COURT: What?

MR. KATZ: Yes.

THE COURT: Well, then—

MR. KATZ: No, I'm talking about whether we need Malfer back.

THE COURT: Well, do you? That's my question [117] to you.

MR. KATZ: Well, I think we do, your Honor.

THE COURT: Very well.

MR. KATZ: Because I think we have to get into the lead aspect of it, was it untainted and was it tainted.

I disagree most strenuously with the legal proposition cited with respect to the narrow issue, but in terms of physical suppression—

THE COURT: Okay.

MR. KATZ: —this Winchester casing I think should come in.

THE COURT: As soon as Mr. Malfer comes in we'll put him on the stand and continue with the hearing.

MR. KATZ: All right.

I don't agree that under the law as it existed then or as it exists now that the plain view aspect or the plain view sanitizes the unlawful entry.

Clearly they had sufficient time to get a warrant. Detective Malfer told us that—and indeed the district attorney told us—that this defendant was a suspect a day before.

[118] THE COURT: Are you familiar with the section upon which the district attorney relies, 140.15?

MR. KATZ: Yes; we have it in front of us, your Honor.

THE COURT: Okay. Because I'm going to take argument on that section as well.

So supposing we suspend until Mr. Malfer comes in.

MR. KATZ: All right.

MR. K JACOBS: Let me see if he has arrived, Judge. I have been calling.

THE COURT: Would you let me know? Because I have three lawyers waiting.

MR. JACOBS: I understand that.

(Whereupon Mr. Jacobs left the courtroom and returned shortly after.)

MR. JACOBS: Judge, he's not back. I'll go downstairs and see if—

THE COURT: Mr. Katz and Mr. Payton, I'm going to call Mr. Payton out again as soon as Mr. Malfer arrives. Would you stand by?

(Whereupon the hearing continued shortly thereafter, as follows:)

THE COURT: Are we ready on the hearing?

[119] MR. JACOBS: Yes.

THE COURT: Thank you very much, Mr. Malfer, for coming back. I know it was short notice.

THE CLERK: Indictment 1649 of 1970, People of the State of New York against Theodore Payton, charged with murder.

The defendant present with counsel. Mr. Burns, Mr. Katz and assistant district attorney Jacobs present.

THE COURT: You know, I have expanded the nature of the hearing before me to incorporate your application, counsel, to suppress tangible evidence allegedly recovered in the apartment of Mr. Payton.

There has been a concession by the district attorney with respect to ietems A and B set forth in his answering motion papers.

And so I think it might be necessary, Mr. Galloway, to swear the witness again.

THE CLERK: Yes, your Honor.

MAL MALFER, a former Detective of the Bond and Forgery Squad, New York City Police Department, now on terminal leave, called as a witness on behalf of the People, having been first duly [120] sworn by the Clerk of the Court, testified as follows:

THE COURT: As I say, thank you very much for coming back.

Mr. Jacobs.

MR. JACOBS: Thank you, Judge.

DIRECT EXAMINATION

BY MR. JACOBS:

Q. Detective Malfer, this is a continued hearing where your previous testimony left off.

MR. JACOBS: But we can incorporate the other testimony, your Honor.

Q. Detective Malfer, am I correct that you were the detective assigned to the investigation of the shooting of Roberto Carassas on January 12th, 1970?

THE COURT: Could you just give me the spelling of that last name? I had some trouble with it.

MR. JACOBS: Certainly, Judge. Let me get it.

C-a-r-a-s-s-a-s.

THE COURT: Thank you. All right.

Were you the detective assigned to investigate the shooting of Robert Carassas?

[121] THE WITNESS: Yes.

THE COURT: And on what day was the shooting, if you know?

THE WITNESS: January the 12th.

THE COURT: Was this a homicide?

MR. JACOBS: Yes.

BY MR. JACOBS:

Q. Well, Mr. Malfer, was that a homicide?

A. Yes, sir.

THE COURT: January 12th, 1970?

THE WITNESS: Yes, sir.

Q. And that was at a gas station; am I correct?

A. Yes.

Q. Located at 1995 First Avenue here in the City and County of New York?

A. Yes, sir.

Q. And you responded to the scene, Detective Malfer, sometime in the early morning; is that correct?

A. Yes.

Q. And from that time up until the morning of January 15th, some three days later, did you investigate this homicide?

A. I did.

[122] Q. Did you speak to various witnesses at the scene?

A. Yes, sir.

Q. Did you speak to witnesses who were not at the scene?

A. Yes, sir.

Q. And did there come a time on January 14th, 1970, that you learned the name of the alleged perpetrator of this murder?

A. Yes, sir, I did.

MR. BURNS: Can I caution Mr. Jacobs perhaps with respect to leading? Because we're—

THE COURT: Well, we are not at the apartment yet, and we want to get there, and I suppose leading is harmless at this point.

Did you learn the name of the alleged perpetrator?

THE WITNESS: Yes.

BY MR. JACOBS:

Q. And what date was that?

A. On January the 14th.

Q. And what name did you learn?

A. We learned the name Teddy Payton.

Q. And was that from conversation with wit- [123] nesses?

A. Yes, sir.

Q. Did you also learn the address?

A. Yes, sir.

Q. What address?

A. 682 East 141st Street, Apartment 5-C.

THE COURT: East 141st Street, apartment 5-C?

THE WITNESS: Yes, sir.

Q. Did there come a time, Detective Malfer, that you responded to that location?

A. Yes, sir.

Q. Would you tell us the date and the time that you responded, please?

THE COURT: When you say "responded," you mean went to that location?

MR. JACOBS: Went to that location.

THE WITNESS: May I go to my notes on this?

THE COURT: Yes.

Don't lead from this point on.

A. On January the 15th, 1970, approximately 7:30 A.M., I was assigned in company with Sergeant Hoarty.

Q. Sergeant who?

A. Hoarty, H-o-a-r-t-y. Detective Brady, Detective [124] Seffers, -S-e-f-f-e-r-s, and Detective McPartland, M-C P-a-r-t-l-a-n-d. Responded to 682 East 141st Street, Apartment 5-C.

Q. What happened when you got there?

A. A light could be seen from the bottom of the door, and I heard a radio—

MR. KATZ: Excuse me, Mr. Malfer.

I don't believe this witness should be reading from his notes. He may refresh his recollection if he has to, but I don't believe it's proper for him to be reading.

THE COURT: Well, if you recall tell us what you remember; if you are unable to recall you may look at your notes to refresh your recollection.

THE WITNESS: All right, Judge.

This is four and a half years ago, and I feel that I should go to my notes.

THE COURT: If you—

MR. BURNS: Well, that is what I wanted the record to reflect, your Honor, that if he cannot recall from his independent recollection let him state it for the record if he has to refresh his recollection by looking at his notes.

[125] THE WITNESS: I am able to recall without checking my notes that this situation existed. There were lights from underneath the door and there was a radio playing.

BY MR. JACOBS:

Q. What happened?

THE COURT: And the record will reflect that he testified to those facts without looking at his notes.

Q. What happened, Detective Malfer?

A. We then asked for assistance.

MR. BURNS: My problem with this, your Honor—I hate to be interrupting—I notice that Detective—former Detective Malfer, his eyes keep dropping down to his notes.

THE COURT: All right.

MR. BURNS: I would like the record to reflect each time that he has to refresh his recollection by looking at the notes, that the record should so reflect, that's all.

THE COURT: Okay.

What they're saying, Detective Malfer—

THE WITNESS: Yes.

THE COURT: —is that first listen to the [126] question.

THE WITNESS: Right.

THE COURT: To see if you can respond to the question without looking at your notes. If you are unable to do that then ask me for permission to look at your notes.

THE WITNESS: All right.

THE COURT: And then after looking at your notes, then you may testify from your recollection if your recollection has been refreshed.

THE WITNESS: All right.

THE COURT: If you can't do that we'll meet the problem some other way.

BY MR. JACOBS:

Q. Detective Malfer, did you or any of the other officers knock on the door?

A. Yes, we did.

Q. Do you recall who knocked on the door?

A. To my best recollection I couldn't say. Perhaps I did and others with me did.

Q. But you recall that someone knocked on the door?

A. Yes, sir.

Q. Was there a response?
[127] A. No.
Q. What happened then?
A. At that point we called on the Emergency—
THE COURT: Don't look at your notes now.
A. (Continuing) At that point we called on the Emergency Service to give us a hand with getting through the door.
Q. And did Emergency Service respond?
A. Yes, they did.
Q. And was the door subsequently broken into?
A. Yes, it was.
Q. And did you and the other officers enter the apartment?
A. We did.
Q. And was anyone in the apartment?
A. No, sir.
Q. What happened inside the apartment?
THE COURT: Don't look at your notes, please.
THE WITNESS: No, sir.
Q. What happened inside the apartment?
MR. BURNS: Perhaps he can close that book or whatever it is that he's reading from.
THE COURT: Well, let's try and do it my way.
MR. BURNS: All right, your Honor.

[128] BY MR. JACOBS:

Q. What happened inside the apartment?
A. We conducted a search of the apartment for the person whom we were seeking.
Q. That was Theodore Payton?
A. Yes, sir.
Q. And was he in the apartment at that time?
A. No, sir.
Q. Am I correct you had no search warrant at that time?
A. No, sir.
Q. You were responding to the apartment based upon information that you had from witnesses that you had spoken to?
MR. BURNS: I object to the leading.

THE COURT: Sustained.
MR. JACOBS: I'll withdraw the question.

[129] BY MR. JACOBS:

Q. Did you find certain property in the apartment that you took into your possession?
A. Yes, sir.
Q. Would you tell us what property you found, where the property was, please, Detective Malfer?
A. To the best of my recollection, as far as where the property was now, I recovered a shotgun which could have been in a closet. Whether it was a linen closet or clothes closet, at this point I cannot recall.
Also found a bandolier containing fourteen buckshots that go with the shotgun.
Also a thirty caliber shell casing.
Q. Where was that found?
A. That was on top of a bureau.
Q. Was it on top of a bureau or on top of a stereo?
MR. BURNS: I object to that.
THE COURT: Sustained.
THE WITNESS: At this point, I can honestly say—
THE COURT: The question has been objected to.

[130] BY MR. JACOBS:

Q. Yes, Detective Malfer?
A. I cannot honestly state whether it was on top of a stereo—
MR. BURNS: Objection. I don't understand—
THE COURT: I sustained the objection to the question and so the witness is—should not answer it.
You may put another question to him.

BY MR. JACOBS:

Q. Detective Malfer, referring to your notes that are already introduced into evidence or deemed marked into evidence—
THE COURT: Are these the same notes that were deemed marked at the other hearing?
MR. JACOBS: That's correct, sir.
THE COURT: They were marked, Mr.—We'll mark them again at this hearing.

MR. JACOBS: I should note, your Honor, when I say "marked", I'm referring to the specific page that he is making reference to, not necessarily the whole notebook which contains some fifty odd pages.

I have intentions, your Honor, as soon as Detective Malfer completes his direct testimony, [131] to turn a copy of that page over to defense counsel.

I have made a xerox—

THE COURT: Is this a page different from the one we had last time?

MR. JACOBS: Yes, sir.

THE COURT: This will be deemed. This will be deemed People's—The book was marked earlier in the hearing. It was a memo book which was marked 2 and the two page statement which contained the alleged—the two pages, rather, which contain the alleged statement of the defendant, was marked 3. So I suppose now we're talking about a different page?

MR. JACOBS: Correct, sir.

THE COURT: This could be deemed 4 at this point.

What is the number on your pages? Do you have a number?

THE WITNESS: It's not numbered.

THE COURT: All right, but the page which has to do with the search of the apartment is a page which is different than the other page which was introduced last time?

THE WITNESS: Yes.

[132] THE COURT: This will be deemed marked 4.

(Page of memo book deemed marked People's Exhibit 4 for identification.)

MR. BURNS: Before he testifies to it, may we know if it's going into evidence.

THE COURT: It hasn't been offered in evidence.

MR. BURNS: I thought he was going to offer it in evidence.

THE COURT: Marked 4 for identification.

Of course, you're going to have an opportunity to see it. I'll do it at the conclusion of the examination.

MR. BURNS: I just want to glance at it before he testifies from it.

I understood from—I'm sorry, I understood from his last question that he was referring to something which he stated that he thought had already been deemed, but it wasn't deemed and now we're talking about something different.

THE COURT: Just in order to satisfy your curiosity you can look at it now.

MR. JACOBS: Judge, it's not in evidence and it's his memo book and I object to it.

[133] There are other references which are there. Now we're getting to the point where we're just turning over things. I prepared a copy of this on Rosario, too.

THE COURT: Then your curiosity will be satisfied at a later time. It will be—

MR. BURNS: Just as long as when it goes into evidence—

THE COURT: You'll be able to look at it and make any appropriate objection.

I always like to do things in the fraternal way, if I can; if I can't, then I'll adhere to the rules.

MR. JACOBS: Thank you, Judge.

THE COURT: You bet.

BY MR. JACOBS:

Q. Detective Malfer, pertaining to your note book, will you tell us if it refreshes your recollection, using your notebook, where this thirty caliber Winchester casing was found?

A. May I use the—

THE COURT: Yes, indeed.

THE WITNESS: My note states—

THE COURT: Never mind what your note states.

[134] BY MR. JACOBS:

Q. Look at your notes and see if it refreshes your recollection, Detective Malfer?

A. Yes.

THE COURT: Having looked at it, what is your best recollection as to where the shell casing is?

THE WITNESS: On top of the stereo in the living room.

THE COURT: Okay. Now we're gotten over that.

BY MR. JACOBS:

Q. Was that in plain view, that casing?
A. Yes, sir.
MR. BURNS: I object to that.
THE COURT: Overruled.

BY MR. JACOBS:

Q. Was it in plain view, detective?
A. Yes, sir.
Q. Do you recall what, if any, other property was found, please?
A. Yes.
Q. Besides the property you have already described?
A. I've described a shotgun and the shells that went with this.
[135] Also found was a sales receipt.
Q. For what type of gun?
A. For a thirty caliber Winchester and other items on such sales receipt.
Q. Was that sales receipt for the shotgun—for a shotgun or for a Winchester, Detective Malfer?
A. For a Winchester.
Q. Is that your best recollection of it?
A. Yes, sir.
Q. And was any other property found?
A. Several photographs.
Q. Where were they found, if you recall?
A. Again, to the best of my recollection, possibly in one of the drawers or on top of a bureau.
I cannot say for sure at this point.
MR. JACOBS: Your Honor—
THE COURT: Did you take this thirty caliber casing with you?
THE WITNESS: Yes, sir.
THE COURT: And did you take with you the other items that—to which you have just testified, the thirty caliber Winchester rifle and several photos?
THE WITNESS: Yes.
THE COURT: Was it a rifle or a shotgun?
[136] THE WITNESS: It was a shot gun.

THE COURT: Shotgun and several photos?
THE WITNESS: Yes.
THE COURT: Okay.
Is there something else?
MR. JACOBS: No, sir, Judge.
I prepared a xeroxed copy of Detective Malfer's memo book with respect to the entry into the defendant's apartment.
Perhaps we should have the memo book brought over so that Mr. Katz and Mr. Burns can compare the xerox that I have made at their convenience with the memo book.
THE COURT: Okay, do that. Give it to Mr. Jacobs so he can handle it the way he wants to.

(Handing to Mr. Katz and Mr. Burns.)

MR. JACOBS: Return the detective's memo book.

(Handing to the witness.)

MR. JACOBS: The record should indicate Mr. Katz and Mr. Burns had an opportunity to compare the memo book with the xeroxed copy that I gave them.
THE COURT: Okay.
[137] At the last hearing I noticed that two-page statement, Exhibit 3, which reflected the defendant's statements made to Mr. Malfer, was not offered in evidence.
MR. JACOBS: No, sir.
I would only be able to offer it into evidence—The People would be, as a past recollection recorded, which was not done either with that exhibit or with this exhibit.
I think the purpose of marking them and everything was more for Rosario material having been turned over to defense than actually as an exhibit into evidence.
MR. KATZ: Your Honor, I think we can safely have them marked in evidence for the purpose of this hearing.
MR. JACOBS: Yes, I have no objection to that.

THE COURT: Then why don't we consider those items heretofore marked for identification as being in evidence, but only for the purpose of this hearing.

MR. KATZ: Okay.

THE COURT: And this ruling incorporates all past exhibits on April 26th marked for identification [138] as well as any exhibits marked for identification today.

The offer into evidence, or the receipt into evidence, is solely for the purpose of this hearing.

THE CLERK: That would be People's 1, 2, 3 and 4, your Honor.

THE COURT: Right.

MR. JACOBS: Judge, I hate to be picayune, the whole book should not be in evidence.

THE COURT: No, just the particular pages involved.

MR. BURNS: I'm sorry, is—2 is really only for identification.

THE COURT: 1, 3 and 4; okay.

MR. JACOBS: Thank you, Mr. Burns.

THE COURT: 1, 3 and 4 then; that's quite correct.

All right, the book itself has been marked for identification except for those pages received in evidence.

(People's Exhibits 1, 3 and 4 for identification now received in evidence.)

THE COURT: Are you ready to examine Mr. Malfer? Let's go, gentlemen.

[139] MR. JACOBS: I followed your Honor's suggestion and xeroxed up several copies of the memo book.

THE COURT: It's always helpful.

Can we move ahead, please?

MR. KATZ: Yes, one moment, your Honor.

THE COURT: Can we go ahead now, please?

MR. KATZ: Yes, your Honor.

CROSS EXAMINATION

BY MR. KATZ:

Q. Mr. Malfer, you told us on direct examination that you had learned the name of the alleged perpetrator on January 14, 1970; is that correct?

A. Yes.

Q. And that his name was told to you by witnesses that his name was Teddy Payton?

A. Yes.

Q. And you also were told where Teddy Payton lived; is that correct?

A. Right.

Q. And all of this on January 14, 1970; is that correct?

A. Correct.

Q. Now, when you learned that, sir, did you do [140] anything—make any efforts whatsoever to obtain a search warrant for Mr. Payton's apartment?

A. To the best of my recollection, no.

Q. Was there an arrest warrant issued for Mr. Payton on January 14, 1970?

A. No.

Q. January 15, 1970?

A. No.

Q. Now, you went to Mr. Payton's apartment at 682 East 141st Street, in the Bronx, on the—about seven-thirty on the 15th of January, 1970; is that correct?

A. Yes, sir.

Q. And you went there with several other detectives whose names you gave us; is that correct?

A. Yes, sir.

Q. Did anyone have an arrest warrant for Mr. Payton, to your knowledge?

A. No, sir.

Q. There was no arrest warrant?

A. No, sir.

Q. And it was after, was it not, Detective Payton—Detective Malfer, it was after you went to the defend-

ant's apartment that an alarm went out for his arrest; isn't [141] that correct?

A. May I recollect with these notes on that?

THE COURT: Yes, you may, surely.

THE WITNESS: Right.

Yes, that is correct.

BY MR. KATZ:

Q. Indeed, I believe you told us at the hearing a few weeks ago that the alarm went out at 11:15 a.m. on January 15, 1970; is that correct?

A. That is correct.

Q. What time did you leave the defendant's apartment on that date? Do you recall?

A. I do not recall that.

Q. It was prior to 11:15 a.m.; was it not?

A. I jwould safely say so.

Q. And it was after you left the apartment that you or someone in your company caused the alarm to be issued; isn't that correct?

A. Correct.

Q. And would it be fair to say, sir, that that alarm went out based on what you found at that apartment?

MR. JACOBS: Objection to the question.

THE COURT: Sustained.

BY MR. KATZ:

[142] Q. Can you tell us, sir, why an alarm had not gone out prior to 11:15 a.m. on January 15, 1970?

MR. JACOBS: Objection.

THE COURT: Sustained.

BY MR. KATZ:

Q. All right. In any event, you had neither an arrest warrant or search warrant, is that correct, when you went to the premises on January 15, 1970?

A. That's correct.

Q. Now, there was yourself, a Sergeant Hoarty, Detective Brady, Detective Seffers and Detective McPartland; is that correct?

A. Correct.

Q. You all went there in one car?

A. I can't recall if it was one or two cars.

Q. And you went to the apartment; is that correct?

A. Correct.

Q. Was anyone on the roof? Did any one of you go to the roof?

A. At this point I couldn't be quite sure. But this is possible.

Q. Was there a stakeout of any sort at that time?

A. At the apartment?

Q. Yes, sir.

[143] A. No, sir.

Q. All of you went to the door?

A. I can't say if all of us went to the door, no.

Q. What unit was Sergeant Hoarty attached to?

A. He was my sergeant; the 23rd Squad.

Q. From the 23rd Squad?

A. Right.

Q. And Detective Brady?

A. From the 23rd Squad.

Q. Detective Seffers?

A. Manhattan North Homicide Squad.

Q. And Detective McPartland who was from Manhattan North Homicide as well; is that correct?

A. Correct.

Q. Now, you went to the door; is that correct?

A. Correct.

Q. All five of you, as you recall?

A. As I said before, I cannot recall if it was all five or whether we did disburse some of the men elsewhere.

Q. Sir, you were at the door?

A. Oh, yes.

Q. Did you have your gun drawn?

A. I can't recall that.

Q. Do you recall whether any of the other officers [144] had their guns drawn?

A. Not at the moment, no.

Q. Now, prior to arriving at the apartment, had you made any attempt to ascertain whether the defendant was there?

A. That I can't recall.

Q. Now, you looked through the keyhole, did you, Mr. Malfer?
A. I don't recall that either.
Q. Did you look under the door?
A. There was light shining from underneath the door.
Q. There was a light shining?
THE COURT: "From underneath the door."

BY MR. KATZ:

Q. This is seven something in the morning?
A. Seven-fifteen in the morning.
Q. And the door was locked, was it not?
A. Yes, it was locked.
Q. And you hears some music coming through?
A. Yes, sir.
Q. Was it loud?
A. Loud enough for us to hear.
Q. Did you secure the apartment, in any event?
MR. JACOBS: I object.
[145] THE COURT: Did you what?
MR. KATZ: Secure the apartment.
THE COURT: What do you mean by that?
MR. KATZ: Well, place a guard there.
THE WITNESS: After we entered the apartment?
MR. KATZ: Yes.
THE WITNESS: To the best of my knowledge, I believe we did.

BY MR. KATZ:

Q. All right, let's get you in the apartment first. You knocked on the door and there was no response; is that correct?
A. Right.
Q. And then what happened?
A. Well, after making—Well, after trying to gain entry by calling to the attention if someone would answer the door, we then called for Emergency Service.
MR. BURNS: I'm sorry, I didn't hear him.
THE COURT: "After trying to get entry, we called for the Emergency Service."

BY MR. KATZ:

Q. Well, didn't you try to force entry yourself?
A. No, sir.
Q. Weren't you concerned that the person you were [146] coming to visit might get out the fire escape while you were calling Emergency Service?
A. Well, there, again, I repeat, we're going back a long time.
I assume if we worked the way we normally worked, that we had that situation covered.
Q. Well, did anyone go up to the roof?
A. I cannot recall who went to the roof.
Q. Someone went and made a telephone call or radio call to Emergency Service? Is that correct?
A. That's correct.
Q. And no one in your party attempted to get through the door; is that correct?
A. No, sir.
Q. And no one attempted to get in through a fire escapt, if there was one?
A. No, sir, not at that time.
Q. How long did you wait at the door before Emergency Service came?
MR. JACOBS: Judge, I'm going to object.
I don't see the relevancy of this line of questioning.
THE COURT: I suppose it has to do with whether or not the officer wanted to utilize, as the statute [147] seemingly permits him to, utilize entry.
I suppose the point of Mr. Katz is, if they really wanted to get the defendant, they wouldn't have called Emergency Service.

BY MR. KATZ:

Q. How long were you waiting there?
THE COURT: It bears on the factual issue here.
THE WITNESS: How long were we waiting for Emergency Service?

BY MR. KATZ:

Q. Yes.
A. I can't recall.

Q. Was it more than five minutes?
A. I don't recall.
Q. More than a half-hour?
A. I can't recall.
THE COURT: Do you recall the nature of the door, was it of wood or anything else?
THE WITNESS: The door, to the best of my recollection, was of metal.
And the reason why we would have to call Emergency Service was because the door was such a problem to us, we couldn't handle it alone. This is [148] why we were called in.

[149] BY MR. KATZ:

Q. What attempts did you make to get into the door?
A. There again I can recall trying to force the door ourselves, but we were not equipped with the proper tools.
Q. Did you have a gun?
A. Did I have a gun?
Q. Yes.
A. Yes, I had a gun.
Q. To your knowledge, did the other officers with you have guns?
A. Every officer is armed.
Q. There came a period of time that Emergency Service responded; is that correct?
A. Correct.
Q. And how was entry through the door obtained?
A. They forced the door open.
Q. With a jimmy of some sort, axe?
A. Whatever tools they have.
Q. They smashed the door down?
A. They opened the door, yes.
Q. How? What did they do?
A. They forced the door open.
Q. With what?
A. Whatever tools they had at their disposal.
[150] Q. Do you remember?
A. I don't remember.
Q. Were you there?
A. Yes.

Q. When you say they forced the door, did they break into the apartment?
THE COURT: Well, that's a conclusion that one could draw.
Q. Did they huse a hammer or axe—
THE COURT: Please. That's a conclusion that one can draw from having a door forced open.
Q. Do you have any recollection at all, Mr. Malfer?
A. I can recall crowbars.
Q. You can recall crowbars?
A. Yes.
Q. Do you recall crowbars being used?
A. Yes.
Q. And you you recall the door collapsing after the crowbars were used?
A. I recall the door being opened.
Q. Then you walked in; is that right?
A. Correct.
Q. Where was the light?
THE COURT: Do you recall where the lights were [151] at that time?
THE WITNESS: To the best of my recollection, I believe the entry was a slight hallway prior to entering a room. As to where the light was shining from at this point I can't say. It could very well have been from the ceiling or from a lamp. I cannot recall at this point.

BY MR. KATZ:

Q. You have no present recollection?
A. No, sir.
Q. You got into the apartment. How many rooms? Do you recall how many rooms there were in that apartment?
A. Not at the moment, no, sir.
Q. And there were how many? There was you. There were five of you, is that correct, five detectives?
A. Plus the Emergency Service.
Q. How many Emergency Service men were there, do you recall?
A. I believe there were two.

Q. Where did you go upon gaining entrance to the apartment?
A. Seached the apartment, checked the rooms.
Q. Well, how many rooms were there? I beg your pardon?
[152] Q. How many rooms?
A. I repeat, I do not recall.
Q. Was it a large apartment?
A. No.
Q. Small?
A. To the best of my recollection.
Q. How long did it take you to search the apartment?
A. That I can't recall.
Q. What were you searching for?
A. At that moment, we were searching for Mr. Theodore Payton.
Q. All eight of you, approximately; is that correct?
A. Whatever number was there.
Q. Well, there were five detectives and two or three Emergency Services people?
A. Yes.
Q. That makes about eight, doesn't it?
MR. JACOBS: Seven.
Q. Seven or eight. Divided up, go into different rooms?
A. I assume they did, yes.
Q. Not assume. What did you do?
A. I would take it for granted.
Q. Don't take anything for granted. What did you do?
[153] THE COURT: Excuse me.
If you can't remember, say you don't remember, and we'll go on from there.
A. I don't remember.
Q. Do you remember how long you were in the apartment that morning?
A. I don't remember.
Q. What was the first thing you did when you got in the apartment?
A. Started a search of the apartment.

Q. Where did you search?
A. I don't recall.
Q. Did you search under the bed?
A. We searched every place.
Q. Did you search in a drawer for Mr. Payton?
A. No, we didn't search in a drawer for Mr. Payton.
Q. You did open drawers, did you not?
A. Yes.
Q. You opened closets?
A. Yes.
Q. You took out the contents of drawers, did you not?
A. Yes.
Q. Did you have envelopes with you, Property [154] envelopes?
A. Did we have Property? No, we did not.
Q. You searched cupboards?
A. Yes.
Q. Where else did you search?
A. I would say we searched the whole apartment.
Q. Was there a mattress?
A. Yes.
Q. Did you tear the mattress apart?
A. Didn't tear it apart, to my recollection. But we did search under it.
Q. In other words, would it be fair to say, Detective, that you ransacked that apartment?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. You weren't looking for Mr. Payton in the cupboard, were you?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. Did you expect to find Mr. Payton in a bureau drawer?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. You were searching the apartment, were you not?
[155] A. Yes.
Q. For property, were you not?
MR. JACOBS: Objection.

THE COURT: Sustained.
Q. Were you searching for items of evidence?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. What were you searching for?
A. Mr. Payton.
Q. In a dresser?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. You did open dressers, did you not?
A. Yes.
THE COURT: He already testified he opened drawers, he opened cupboards, he opened closets, and that he went in there looking for Mr. Payton. What conclusion should be drawn, the Court can draw.
Q. Now, you told us that you found, is that correct, did you find a shotgun in a closet?
THE COURT: Was it you who found the shotgun?
THE WITNESS: I did, yes, sir.
Q. Did you take any other items from that closet?
[156] A. I believe the bandoleer with the shotgun shells was also there.
Q. Where in the closet was the bandoleer, Mr. Malfer?
A. I can't recall that.
Q. Where in the closet was the shotgun?
A. Also, I can't recall that.
Q. In what room was the closet located?
A. Can't remember.
THE COURT: Is it necessary to go into, in your examination, so much detail in view of the concession of the district attorney that these items were seized illegally?
Q. To your knowledge, Mr. Malfer, were you the only one who in that party removed any items from that apartment that morning?
A. To the best of my recollection, I was the one who found the items mentioned.
Q. And to the best of your recollection, no one else removed anything from that apartment; is that correct?
A. To the best of my recollection, yes, sir.

Q. Now, did you find the shotgun first or did you find the photos first?
A. Would you repeat that?
[157] Q. Did you find the shotgun first or did you find the photos of the defendant?
THE COURT: Is that really relevant here, in view of the concession?
What we're really concerned with on this yearing you know, is the issue pertaining to the alleged seizure of the .30 calibre casing.
MR. JACOBS: Correct, sir.
THE COURT: The officer has been in the apartment. It's conceded there was no warrant either for the arrest or for the search.
MR. KATZ: Your Honor, I think it really bears on his credibility.
THE COURT: Many things go to credibility, but if we're not to draw the line, then you can go down to infinite detail, which I don't think is warranted.
MR. KATZ: May I have just that one question?
If he found the Winchester rifle first, of the various items you say you found that morning?
MR. JACOBS: Objection. He didn't find a Winchester rifle. He found a Winchester shotgun.
THE COURT: Is that the item you found first?
THE WITNESS: That I can't recall.
THE COURT: Okay. Next question.

[158] BY MR. KATZ:

Q. Where was the living room located with respect to the doorway?
A. I repeat, this I can't place in my mind.
Q. Was there a light on in the living room when you entered?
A. There was a light. As to where the light was coming from, I cannot remember.
Q. And did you find this .30 calibre Winchester casing, you personally?
A. Yes, sir.
Q. You personally?
A. To the best of my recollection, it was I, yes.

Q. And when did you find it in point of time after entering the apartment?

THE COURT: You mean how long after he entered the apartment?

Q. Yes.

A. I can't recall how long, no, sir.

Q. Was it sort of standing up like a trophy on top of a stereo set?

MR. JACOBS: Objection.

THE COURT: Sustained.

Q. Where was it located?

[159] A. On top of the stereo in the living room.

Q. Standing up?

A. This I can't recall.

Q. Did you come upon it as soon as you entered the apartment?

A. No, I don't believe I came upon it as soon as I entered the apartment. I can't recall exactly when I spotted it. But I can't say it was as soon as I entered the apartment.

Q. Were the other officers searching the apartment while you were searching?

A. Yes, sir.

Q. And they were searching the living room as well?

A. The whole apartment.

Q. There were only three rooms there, weren't there, Detective?

A. I don't recall how many rooms there were.

Q. But you distinctly remember seeing that casing; is that correct?

A. Yes, sir.

Q. When you found that casing, Detective, were there other officers in that living room?

A. I can't recall that.

Q. What did you do with it when you found it?

[160] A. I brought it back with me.

Q. Where did you put it?

A. I brought it to the 23rd Precinct.

Q. Was this a rifle casing?

A. Yes, sir

Q. Now, were there any other items in plain view in the living room?

MR. JACOBS: Objection.

THE COURT: Sustained.

Q. Can you describe for us what was contained in the living room, furniture?

A. Furniture?

Q. Yes, whatever. Tell us what was there?

A. No, I cannot recall that, no.

Q. Do you recall a stereo set?

A. No.

Q. You don't recall a stereo set?

A. No.

Q. Do you recall a casing sitting on top of a what?

A. Of a stereo set.

Q. I thought you just told us you don't recall the stereo set?

A. I assumed you were asking a description of the stereo set.

[161] Q. No, no. Is that the only item of furniture or any other furnishing that you recall in that apartment, is a stereo set?

A. I made a notation that this was found on top of a stereo set.

Q. But do you have any independent recollection as you sit there now about any other item of furniture or furnishing that was in that apartment?

MR. JACOBS: Objection.

THE COURT: Overruled.

A. Not at this moment.

Q. At any moment. Did you have any a year ago?

MR. JACOBS: Objection.

THE COURT: Sustained. Anything else?

MR. KATZ: Yes, your Honor.

Q. Do you recall, Mr. Malfer, when on January 14, 1970 you first learned of where Mr. Payton lived?

MR. JACOBS: Objection, Judge.

THE COURT: Sustained.

Q. Did you go to that apartment building on January 14, 1970 looking for the defendant?

A. At this moment I can't recall whether we did or not.

Q. Well, looking at Exhibit 2, your book, see if that refreshes your recollection.

[162] THE COURT: Would you do that, please.

THE WITNESS: Surely.

A. I have a notation here.

THE COURT: Just bear with me a moment.

A. I have a notation—

THE WITNESS: Can I use my notes?

THE COURT: Yes.

A. That on January the 14th, 1970, the house where Teddy lived—

Q. Mr. Payton?

A. 682 East 141st Street, top floor was pointed out to me.

[163] BY MR. KATZ:

Q. Was it pointed out to you?

A. Yes.

Q. While you were in that—you were right there in the building, is that right?

A. Yes.

Q. Did you do anything to effect arrest on that date of Mr. Payton?

A. I beg your pardon?

THE COURT: Did you do anything on January 14th—

Q. To effect the arrest of Mr. Payton.

A. No, sir, I did not.

Q. You did not?

A. No.

Q. And you had all the information then, you tell us, that is, on January 14th, 1970, that you had the following day; is that correct? There was nothing added to your knowledge to effect the arrest on the 15th, isn't that true?

MR. JACOBS: Objection, Judge.

THE COURT: Sustained.

Q. Did you make any effort to obtain an arrest warrant on January 14th, 1970?

[164] MR. JACOBS: Objection, Judge.

THE COURT: Is it conceded, Mr. Jacobs, that at no time up until the time of entry in the apartment no effort was made to either—to obtain either a search warrant or an arrest warrant?

MR. JACOBS: That is correct, sir.

THE COURT: So why do we have to go into it?

BY MR. KATZ:

Q. All right. Now, were you told, Mr. Malfer, by any of these witnesses when Mr. Payton would be at home?

MR. JACOBS: Objection.

THE COURT: Sustained.

MR. KATZ: All right.

Q. Now, on January 16, 1970, you questioned Mr. Payton at the 23rd Squad; is that right?

THE COURT: I think there was testimony he came in on that day.

MR. JACOBS: Yes.

(Witness peruses notes.)

A. Yes.

Q. All right.

Now, prior to your interrogating Mr. Payton on the 16th of January, 1970, you had been to his apartment [165] and had taken out these various items that we've discussed here today; is that correct?

A. Yes.

Q. All right. Specifically you had taken out a .30 caliber Winchester rifle casing; is that right?

A. Yes, sir.

Q. Now, on the 16th of January, 1970, you questioned Mr. Payton about a .30 caliber Winchester rifle, did you not?

A. Yes, sir.

Q. Where was that casing located when you physically located it when you questioned Mr. Payton?

MR. JACOBS: Objection.

THE COURT: Sustained.

Q. Now, when you took that .30 caliber casing you had knowledge, had you not, that the decedent was killed with a .30 caliber Winchester; is that correct?
A. That's correct.
Q. You learned that on the 12th I assume; is that right?
A. It's possible, yes.
Q. Well—
THE COURT: You learned it sometime after you [166] were assigned to investigat the case?
THE WITNESS: Yes.

BY MR. KATZ:

Q. Certainly before the 15th of January you knew that; is that correct?
A. Yes.
Q. All right.
And when you questioned Mr. Payton did you show him the casing?
MR. JACOBS: Objection.
I think we've had this testimony, what was said and what was not said.
THE COURT: Yes. Do you want to go into the hearing again?
MR. KATZ: Well, I thought—
THE COURT: Because we covered it rather comprehensively last time, and in evidence are the two pages, People's 3, and that reflects what was done at the time.
Now, you were rather comprehensive in your cross-examination, Mr. Katz, I can assure you from my own notes.
MR. KATZ: May we have three minutes or so?
[167] THE COURT: Three minutes for a recess?
MR. KATZ: Yes, please.
THE COURT: Sure thing.

(Whereupon, a short recess was declared by the Court.)

AFTER RECESS
HEARING CONTINUED

(Mr. Jacobs, Mr. Katz, Mr. Burns and the defendant are present.)

DET. MAL MALFER, having been previously duly sworn, resumed the stand and testified further, as follows:

THE COURT: All right; did that do it, Mr. Katz?
MR. KATZ: Yes, your Honor, I believe so.
THE COURT: All right.
MR. JACOBS: I just have maybe one question.
THE COURT: One question?
MR. JACOBS: One brief question.

REDIRECT EXAMINATION

BY MR. JACOBS:

Q. Detective Malfer, you said you spoke to several witnesses before you went to Mr. Payton's [168] apartment; is that correct?
A. Yes, sir.
Q. Was one of those witnesses at the scene on January 12th, 1970?
MR. BURNS: I object.
THE COURT: Sustained.
MR. JACOBS: I'll withdraw the question.
THE COURT: There were two questions, and you are withdrawing each of them?
MR. JACOBS: Yes.
THE COURT: Okay.
Does that complete the hearing? Both sides rest?
MR. KATZ: Yes, your Honor.
We would request some time to submit a memo.
THE COURT: All right.
MR. KATZ: Memorandum of law.
THE COURT: Very well.
MR. KATZ: With respect to the suppression, the third item, item C.

THE COURT: How much time do you want? It's an interesting question. A week?

MR. KATZ: One week I guess.

SUPREME COURT
TRIAL TERM
NEW YORK COUNTY

June 4, 1974

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

v.

THEODORE PAYTON, DEFENDANT

DECISION OF SUPREME COURT, NEW YORK COUNTY ON MOTION TO SUPPRESS

HAROLD BIRNS, J. The defendant moves for an order suppressing certain items taken by the People from his apartment.

At a hearing on this motion the sole witness was Detective Malfer. He testified that on January 12, 1970 at 8:40 A.M. a robbery occurred at a gas station at 1895 First Avenue and the manager was shot and killed. Detective Malfer was assigned to this case on that day. On January 14, 1970, as a result of information obtained from eyewitnesses at the scene of the crime and other information presented to him, he learned the name of the defendant as the person who allegedly committed the crime. He also learned of defendant's address.

On January 15, 1970, at approximately 7:30 in the morning, Detective Malfer and five other police officers and detectives went to the defendant's apartment. Detective Malfer knocked on the door but there was no answer. However, the detective noticed a light coming from under the door and heard the radio playing. The detective attempted to open the door, which was constructed of metal, without success. The Police Emergency Services Division was summoned to open the door by force, which was accomplished. Upon entering the apartment, the police officers did not find the defendant. However, in their search of the apartment the police con-

fiscated a Winchester shotgun with 14 shells, found in a closet. Also seized were three photos of defendant in a ski mask and a bill of sale for the shotgun, found in a drawer. Detective Malfer also seized a .30 calibre Winchester casing, which lay on top of the stereo in the living room in "plain view."

The police had neither an arrest nor search warrant at the time they entered the apartment. The District Attorney, however, asserts the presence of the police in the apartment was legal. Accordingly, the District Attorney maintains that the .30 calibre Winchester casing allegedly seen on the top of the stereo was in "plain view" and should not be suppressed. He concedes, however, that the items found in the closet and drawer should be suppressed.

At the time in question, January 15, 1970, the law applicable to the police conduct related above was governed by the Code of Criminal Procedure. Section 177 of the Code of Criminal Procedure as applicable to this case recited: "A peace officer may, without a warrant, arrest a person * * * 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." Section 178 of the Code of Criminal Procedure provided: "To make an arrest, as provided in the last section [177], the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused amittance."

It is abundantly clear from Detective Malfer's testimony that a homicide had been committed, and the police had reasonable cause to believe that the defendant had committed the felony.

Although Detective Malfer knocked on the defendant's door, it is not established that at this time he announced that his purpose was to arrest the defendant. Such a declaration of purpose is unnecessary when exigent circumstances are present (*People* v. *Wojciechowski*, 31 AD2d 658; *People* v. *McIlwain*, 28 AD2d 711).

"Case law has made exceptions from the statute or common-law rules for exigent circumstances which may allow dispensation with the notice * * * It has also been

held or suggested that notice is not required if there is reason to believe that it will allow an escape or increase unreasonably the physical risk to the police or to innocent persons". (*People* v. *Floyd*, 26 NY2d 558, 562.)

The facts of this matter indicate that a grave offense had been committed; that the suspect was reasonably believed to be armed and could be a danger to the community; that a clear showing of probable cause existed and that there was strong reason to believe that the suspect was in the premises being entered and that he would escape if not swiftly apprehended. From this fact the court finds that exigent circumstances existed to justify noncompliance with section 178. The court holds, therefore, that the entry into defendant's apartment was valid.

There is also no lack of cases to substantiate the People's argument that any evidence in plain view might properly be seized (*Ker* v. *California*, 374 US 23; *Coolidge* v. *New Hampshire*, 403 US. 443; *People* v. *Ball*, 41 AD2d 689). The observation of the shell casing, under the circumstances, was inadvertent.

The court rules that the Winchester shotgun, serial number 085194, and a bandolier with 14 shells found in a closet, and the three photos of the defendant in a ski mask, and a bill of sale for the shotgun found in a drawer are suppressed. The court finds, however, that the .30 calibre Winchester casing found in plain view should not be suppressed.

ORDER OF AFFIRMANCE OF THE APPELLATE DIVISION, FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 16, 1976.

Present—Hon. Theodore R. Kupferman,
Justice Presiding,
Vincent A. Lupiano
Louis J. Capozzoli
Myles J. Lane, Justices.

3741

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

—against—

THEODORE PAYTON, DEFENDANT-APPELLANT

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court. New York County (McQuillan, J.) rendered on October 29, 1974, convicting him of the crime of felony murder, and said appeal having been argued by Mr. Elliott Schnapp of counsel for the appellant, and by Mr. Henry J. Steinglass of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

Clerk

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Chronological List of Important Dates

Riddick v. *New York* (No. 78-5421)

April 16, 1974: Indictment filed.

April 25, 1974: Appellant arraigned in Supreme Court, Queens County—enters plea of not guilty.

May 3, 1974: Appellant moves to suppress physical evidence.

June 13, 1974: Hearing on motion to suppress physical evidence.

July 15, 1974: Motion to suppress evidence denied.

August 19, 1974: Appellant withdraws plea of not guilty and enters plea of guilty to criminal possession of a controlled substance in the sixth degree.

September 24, 1974: Appellant sentenced to 2½ to 5 years imprisonment.

March 28, 1977: Judgment of conviction affirmed without opinion by the Appellate Division, Second Department, one Justice dissenting.

July 11, 1978: Conviction affirmed by New York Court of Appeals by vote of 4-3.

September 14, 1978: Notice of appeal to United States Supreme Court filed.

Indictment For
Crim. Poss. of Cont. Sub. 5th Deg.
Crim. Poss. Hypo. Inst.

SUPREME COURT
CRIMINAL TERM
QUEENS COUNTY

No. 8072-74

[Filed April 16, 1974]

THE PEOPLE OF THE STATE OF NEW YORK

against

OBIE RIDDICK, DEFENDANT

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE committed as follows:

The defendant, above named on or about March 14, 1974 in the County of Queens, State of New York, knowingly and unlawfully possessed and had under his control a quantity of a dangerous drug, to wit, a quantity of heroin of an aggregate weight of more than one eighth of an ounce.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant of the crime of CRIMINALLY POSSESSING A HYPODERMIC INSTRUMENT, committed as follows:

The defendant, aforenamed on or about March 14, 1974 in the County of Queens, State of New York, knowingly and unlawfully posssesed a hypodermic syringe or hypodermic needle.

/s/ [Illegible]
District Attorney

[3]

SUPREME COURT, QUEENS COUNTY

SUPPRESSION HEARING TRANSCRIPT

* * * *

(At this point Assistant District Attorney Donald Feldman appears with Assistant District Attorney Richard Wagner on behalf of the People.)

COURT CLERK MANCHER: Page 3, number 3; indictment 8072.

THE COURT: Hearing to suppress physical evidence. Obie Riddick.

[4] Mr. Nathaniel Welkes of the Legal Aid Society is present, and for the defendant Obie Riddick, and Mr. Richard Wagner for the People.

COURT CLERK MANCHER: Obie Riddick. Are you Obie Riddick?

THE DEFENDANT: Yes.

COURT CLERK MANCHER: Is Nathaniel Welkes, present, your attorney?

THE DEFENDANT: Yes.

THE COURT: Call your first witness.

MR. FELDMAN: People call Detective Bisogno.

(The first witness takes the stand and is duly sworn before the Court.)

COURT OFFICER: People call Detective Fred Bisogno, shield number 2732; assignment 112 P.I.U.

FRED BISOGNO, a detective, having been called as a witness on behalf of the People, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FELDMAN:

Q. Detective Bisogno, how long have you been a member of the New York City Police Department?

A. Ten and a half years.

Q. And how long have you been a detective?

[5] A. Five years.

Q. And to which unit are you assigned now?
A. Presently I am assigned to the 112 Precinct Investigating Unit.
Q. Were you assigned to another unit previous to that?
A. Yes.
Q. Which?
A. 17th District Robbery Squad.
Q. Up until what time were you working with the Robbery Squad?
A. Until October of '73.
Q. Now, I call your attention to the date of March 14th, 1974, at about 12:00 noon, at 127-08 165th Street, in the County of Queens.
Did you have occasion to arrest the defendant, Obie Riddick?
A. Yes, sir, I did.
Q. And why did you arrest him?
A. I had gone there to arrest him for a robbery charge.
Q. Can you tell us briefly if you had any information connected with the defendant whereby he committed these robberies?
[6] MR. WELKES: I will object to that.
THE COURT: Sustained.
MR. FELDMAN: Your Honor, I think the C.P.L. would allow hearsay to establish a material fact.
THE COURT: You went there to arrest him, is that it?
THE WITNESS: Yes.
THE COURT: This is a motion to suppress the evidence. He went there to arrest him on another charge.

BY MR. FELDMAN:

Q. Who were you with on this occasion?
A. Detective Ferrick (Phonetic spelling), Detective Burnside, and Parole Officer Tinner (Phonetic spelling).
THE COURT: A parole officer?
THE WITNESS: Yes, sir.
THE COURT: Was the defendant on parole at the time?

THE WITNESS: I believe he was. I don't know.
THE COURT: What was the parole officer doing there if he was not on parole?
THE WITNESS: He came to assist us.
[7] THE COURT: I sure don't understand that.

BY MR. FELDMAN:

Q. When you arrived at this address—by the way, what sort of building is this address?
A. It's a two-family wood frame house.
Q. Tell us briefly what happened when you arrived at that address?
A. I knocked at the defendant's door, which was then opened by, I believe, the defendant's son; a three-year old male Negro opened the door.
Upon the door being opened, I was able to look into a bedroom where I saw the defendant seated in bed with the sheet waist high.
I then walked in, announced my authority, asked him if he was Obie Riddick. He said yes. And I told him he was under arrest, and I then informed him of his rights.
THE COURT: You actually arrested him on these other charges?
THE WITNESS: Yes.
Q. Had you informed him he was under—when you informed him he was under arrest, where was he?
A. He was lying in bed in a sitting up position.
Q. How much of his body was visible to you at [8] the time?
A. Half his body.
Q. Were his hands visible to you at that time?
A. No, they were not.
Q. Why not?
A. They were under the sheet.
Q. And after you informed him he was under arrest, what happened then?
A. I asked him to get out of bed, take his hands out from under the sheet and get out of the bed, at which time he did.

He was standing before me clad in Jockey shorts, only.

I searched the bed area, mattress, under the pillow, and I also searched a chest of drawers approximately two feet from the bed, at which time this contraband was discovered.

Q. Where was the contraband discovered?

A. It was discovered in the drawer in this chest of drawers I had searched.

Q. How many drawers were in this chest?

A. I don't recall. Approximately four or five.

Q. Which drawer was this?

A. Top drawer.

[9] Q. And could you describe for us in a little more detail where the dresser stood with relation to the bed?

A. In width, the dresser was approximately two feet from the bed; say about the center of the bed.

Q. And on which side was it?

A. Facing the bed, or facing toward the headboard, it would be on the right side.

Q. What did you find in the drawer?

A. I found a quantity of narcotics, narcotic instruments, syringes of that type, spoons.

Q. What did you do with those items?

A. They were vouchered at the 112 Precinct.

Q. And did there come a time in the regular course of business when you received laboratory reports on these items?

A. Yes, I did, sir.

Q. Can I see them? Do you have another copy of the lab report with you?

MR. FELDMAN: At this time I offer as People's Exhibit 1 the lab reports.

THE COURT: Mark it People's 1.

Do you have the parole officer here?

MR. FELDMAN: Not yet.

[10] MR. WELKES: No objection for the purpose of the hearing, as to either the evidence or the lab reports.

THE COURT: Was the parole officer present?

THE WITNESS: I believe he was in an adjoining room.

COURT OFFICER: People's Exhibit 1 received and marked in evidence.

THE COURT: Did he meet you at the station house?

THE WITNESS: I had discussed the identification of Mr. Riddick with him. His appearance had changed some from a photo which was shown to—

MR. WELKES: Objection.

THE COURT: Overruled. I will take it.

Why did you discuss it with him?

THE WITNESS: We tried to ascertain the whereabouts of the defendant.

THE COURT: Why did you discuss it with his parole officer?

THE WITNESS: We felt he may know the whereabouts of the defendant.

THE COURT: Was he on parole? That you [11] don't know?

THE WITNESS: At the time I spoke to him, I believe either he had just come off parole or he still had time on parole.

THE COURT: It's very important.

All right. Continue. Excuse me. I didn't mean to raise my voice.

THE WITNESS: I understand.

THE COURT: It's very important that we know whether he was on parole at the time or off parole.

BY MR. FELDMAN:

Q. Detective, would you read to us the pertinent information that is on here? Starting from the top?

A. Laboratory classification. Narcotics. The date is 4-4-74. And it was received from myself, Detective Fred Bisogno, shield 2732, 112th Precinct Investigating Unit, on 3-15-74. The following listed below—Laboratory number is 04047.

THE COURT: It speaks for itself in evidence. Why are we reading it into evidence?

MR. FELDMAN: Okay.

You raise no objection to the introduction of—

THE COURT: No objection for the purpose of [12] the hearing he said.

MR. WELKES: Yes.

I want to voir dire the officer somewhat on this.
THE COURT: What's that?
MR. WELKES: I want to voir dire the officer somewhat on this.
THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. WELKES:

Q. Officer, I ask you to look at this plastic envelope in which is enclosed a manila envelope, and would you tell me what this on the plastic envelope under the name, officer's signature, refers to?
A. This is the officer's signature. This would be the lab technician's signature.
MR. WELKES: I see. Okay.
THE COURT: All right.
MR. WELKES: No objection.
THE COURT: Continue, Mr. District Attorney.
MR. FELDMAN: I offer this in evidence now as People's Exhibit 2.
THE COURT: People's 2.
MR. WELKES: No objection for the purpose of [13] the hearing.
THE COURT: Deemed marked.
MR. FELDMAN: No further questions of this witness.
THE COURT: Any cross?
MR. WELKES: Yes.

CROSS-EXAMINATION

BY MR. WELKES:

Q. Detective Bisogno, when did you first discover that the defendant was charged with a robbery or the subject for investigation purpose of a robbery?
A. Approximately June of 1973.
Q. Now, in June of 1973, when you discovered this information, did you seek out and get an arrest warrant for the defendant?
A. No, sir, I did not.

Q. At any time between June of '73 and March 14th of 1974, did you get an arrest warrant for the defendant?
A. No, sir. I attempted to get a grand jury warrant.
Q. Did you get a grand jury warrant?
A. No, I did not.
THE COURT: In other words, it had not been presented?
[14] THE WITNESS: It had not been presented.
Q. And when for the first time did you learn the whereabouts of the defendant?
A. I believe January of '74.
Q. In January of '74, when you first learned the whereabouts of the defendant, did you attempt to get a warrant at that time?
A. No, sir, I did not.
Q. In other words, when you went to this house, you did not have an arrest warrant?
A. I did not.
Q. Now, did anybody, prior to your entering the house, did anybody else enter the house?
A. Yes, sir.
Q. Who was that?
A. The parole officer.
Q. To the best of your knowledge, did he search the apartment at all?
A. To the best of my knowledge, no, he did not.
Q. And he had entered the apartment?
A. Yes, he did.
Q. And he had a conversation, correct?
A. No, sir, he did not have a conversation.
Q. And did you enter the apartment with your [15] brother officers?
A. I did, too.
Q. At that time did you have your weapons drawn?
A. I did not.
Q. To the best of your knowledge, did any of your brother officers have their weapons?
A. To the best of my knowledge, no, sir.

Q. And how many officers entered the apartment with you?
A. One other.
Q. Which officer was that?
A. Detective Ferrick (Phonetic spelling).
Q. And when you entered the door of the apartment, where did Detective Ferrick go? To the best of your knowledge?
A. To the best of my knowledge, he would have been standing to the left of me, or behind me, when we entered the door.
Q. You are inside the apartment. What, if anything, did you say to the defendant when you first saw him?
A. I announced my authority as a police officer. I then asked the defendant his name and identity, and he told me who he was. And then I placed him under arrest.
[16] Q. How did you place him under arrest? Did you stand by—
A. I told him—I announced my authority after finding his identification, asking him who he was. I announced to him that he was under arrest for robbery.
Q. Where were you when you announced to him that he was under arrest?
A. Standing over the bed.
THE COURT: You advided him of his rights at that time?
THE WITNESS: Yes.
Q. You say you were standing over the bed, correct?
A. Yes.
Q. And where was Detective Ferrick (Phonetic spelling)?
A. I don't recall at that time. His exact location, I don't remember.
Q. Was he on the other side of the bed?
A. I don't recall.
THE COURT: He doesn't recall.
Q. Did you have your weapon drawn at that time?
A. No.
Q. Did you take out any handcuffs?
[17] A. At that point, no, sir.

Q. When you—you told us the defendant was seated in bed?
A. He was seated up.
Q. Did you ask the defendant to get out of bed?
A. Yes.
Q. After the defendant got out of bed, did you place any cuffs on him?
A. No. No, sir.
Q. Did either of your brother officers place any cuffs on him, to the best of your knowledge?
A. To the best of my knowledge, no, sir.
Q. And you then commenced the search of the apartment?
A. I did.
Q. Was the defendant handcuffed at the time you commenced the search of the apartment?
A. I don't believe so.
Q. Was the door left open at the time you commenced to search the apartment?
A. Which door, sir.
Q. The front door?
A. I don't recall.
Q. Who was watching the defendant at the time [18] you searched the apartment?
A. My partner.
Q. Did he have his gun drawn?
A. No.
Q. Did he have the defendant in custody?
A. By custody, what do you mean?
Q. Was he holding him? Was he touching him?
A. No.
Q. Where was the defendant?
THE COURT: (Interjecting) He was not free to leave, was he?
THE WITNESS: No.
THE COURT: He was under arrest, was he?
THE WITNESS: Yes, sir.

BY MR. WELKES:

Q. What would have happened if he had tried to walk out the door?

A. He would have been detained.

Q. Where was he standing with your brother officer at the time you conducted the search of the room?

A. He would have been to my left, approximately three feet from me, my brother officer facing him.

Q. Was your brother officer between you and [19] him?

A. To the best of my knowledge, he was.

Q. Was your brother officer between him and that dresser?

A. I don't recall.

THE COURT: What does that have to do with it?

A. (Continuing) I don't recall. He moved around. I know that.

Q. And you then searched the bed, am I correct?

A. That's correct.

THE COURT: You searched the drawer, too.

We were all over that.

Q. And you stated you found these items in the top drawer of the dresser?

THE COURT: That's true, counselor.

You have a good memory.

MR. WELKES: No further questions.

THE COURT: Step down.

MR. FELDMAN: Just one more question.

REDIRECT EXAMINATION

BY MR. FELDMAN:

Q. Detective, other than this top drawer of the dresser, what, if any other objects, did you search in this room?

[20] A. The mattress, under the mattress, under the pillowcase, and the defendant.

THE COURT: You are looking for weapons, weren't you?

THE WITNESS: Yes, sir. And the defendant's clothes as he got dressed.

THE COURT: No further questions.

MR. FELDMAN: At this time we'd ask for a brief continuance to get another witness.

THE COURT: Where is the other witness?

MR. FELDMAN: I am going to try to ascertain that.

THE COURT: It was marked ready. How long is it going to take you to find out.

MR. FELDMAN: I will let the Court know as soon as possible, within the next few minutes.

THE COURT: We'll take a short recess. You don't have a second witness available?

MR. FELDMAN: No, we don't.

* * * *

COURT CLERK MANCHER: 8072 of '74. Jail case, Obie Riddick. This is People's witness, Detective Fred Bisogno, who was previously sworn. Sit down.

[21] THE COURT: Mr. Welkes, I believe you want to make an application to recall the police officer?

MR. WELKES: Yes.

THE COURT: The police officer is recalled.

He is reminded he is still under oath.

COURT OFFICER MANCHER: The defendant is present.

RECROSS-EXAMINATION

BY MR. WELKES:

Q. Now, Detective, you remember testifying earlier that you came to this house with Mr. Tinner. Was that the parole officer?

A. That's correct.

Q. And did you discuss with him at any prior time about going into this apartment?

A. Yes, I did.

Q. Was he, in effect, your agent when you entered that apartment?

MR. FELDMAN: Objection.

THE COURT: Sustained.

Q. Did he go into that apartment under your authority?

MR. FELDMAN: Objection.

THE COURT: Sustained.

[22] Q. Did you ask him to go into the apartment first?

A. Yes, I did.

THE COURT: He went into the apartment?

THE WITNESS: Yes, he did.

THE COURT: Then he came out of the apartment?

THE WITNESS: Yes.

THE COURT: Did you have a conversation or did he give you a signal?

THE WITNESS: He gave us a signal.

THE COURT: Then you went into the apartment with your fellow officer?

THE WITNESS: That's correct.

BY MR. WELKES:

Q. You testified that after you saw him in the bed you announced your presence and you told him he was under arrest?

A. That's correct.

Q. And did you search the bed for weapons?

A. Yes, I did.

Q. Did you have any apprehension that this man would be armed?

A. Yes, I did.

Q. And you did not place any handcuffs on him?

[23] A. No, I did not.

Q. And you did not have your weapon drawn?

A. My weapon was concealed in my pocket.

Q. Was your hand on your weapon?

A. Yes, it was.

THE COURT: I am more interested in how you got there, Officer. Did you have any information regarding this defendant before you went to that apartment?

THE WITNESS: Yes, I did.

THE COURT: Do you have any complainants on these robberies?

THE WITNESS: Yes.

Q. How did you happen to go to his apartment as a result of these robberies?

THE WITNESS: The defendant had been in the hospital, Harlem Hospital, under an assumed name, and we had lost all contacts with him.

THE COURT: Why were you looking for him in the first place?

THE WITNESS: For robberies.

THE COURT: Who identified him?

THE WITNESS: I have two complainants on my own cases, separate incidents, and there was a [24] case Detective Hoffen of the 107th.

THE COURT: These two cases, how did they identify him?

THE WITNESS: By photos.

THE COURT: You showed them photos of this man and—

THE WITNESS: We showed them groups of photos.

THE COURT: That was the reason you were going over to identify him for robbery?

THE WITNESS: Yes.

THE COURT: Now I understand what happened.

BY MR. WELKES:

Q. And you had these identifications made some time before you actually went to the apartment?

A. That's correct.

Q. And again, for the record, you did not have an arrest warrant?

A. I did not.

Q. Had you presented the case to the grand jury prior to the date of the arrest?

A. No, sir.

THE COURT: No.

Q. But you knew who the defendant was at that time? Prior to going to that apartment, you knew [25] who the defendant was who you were looking for?

A. Yes, I did.

Q. Now, did you find any weapons—

A. No, I did not.

Q. (Continuing) —when you entered, when you searched the apartment?

A. No, I did not.

Q. Do you know, to the best of your knowledge, whether your brother officer had his weapon in any way pointed towards the defendant?

A. No, I do not.

MR. WELKES: I have no further questions.

THE COURT: Do you want to step up, Mr. District Attorney.

(At this point, Mr. Wagner and Mr. Henderson and Mr. Welkes approached the bench to confer with the Court.)

THE COURT: Any further questions, Mr. District Attorney?

MR. WELKES: No further questions.

REDIRECT EXAMINATION

BY MR. FELDMAN: (Continuing)

Q. Was a weapon used in any of these robberies for which this defendant was wanted?

[26] A. Yes, sir.

MR. WELKES: I would ask that be stricken.

THE COURT: I will take it.

MR. FELDMAN: No further questions.

THE COURT: Step down.

Do you rest again, Mr. District Attorney?

MR. FELDMAN: Yes.

THE COURT: There will be no further witnesses called?

MR. FELDMAN: No, Your Honor.

THE COURT: Do you have any witnesses you wish to call?

MR. WELKES: No, Judge.

THE COURT: Decision is reserved.

I want the minutes, Mr. Stenographer.

MR. WELKES: I'd like to make a motion to suppress the evidence at this time. Your Honor, mention has come up of a parole officer who was present at the

time and who, in fact, entered the apartment first at the direction of the police officer. To all intents and purposes, this parole officer was an agent, and I believe that there has been no establishment whether or not the defendant was, in fact, on parole at the time, and I believe, if a parole officer who is—only [27] if the parole officer is presently the parole officer of the defendant, the defendant is on parole, the parole officer has the right to enter the apartment.

I believe here, in effect, the police were using a parole officer to gain entrance to an apartment. Your Honor mentioned probable cause here. I believe they knew about this defendant for a long time prior to finally entering his apartment. They had his identity. They had ample opportunity to get an arrest warrant; and not only that, they had ample opportunity to get a search warrant. They failed to get both of these things, and many months transpired.

THE COURT: You may be right, but I think the only thing to determine here is whether or not the officer had reasonable grounds to believe a felony had been committed and reasonable grounds to believe the defendant had committed this felony.

And further, after making the arrest, if that's established, whether or not he had a right to search the immediate area of the defendant in a search for weapons. I think these are the two things that have to be decided.

[28] MR. WELKES: As to the immediate area, the defendant was quite obviously in custody by the time the search was made.

THE COURT: If you want to supply me a memorandum—

MR. WELKES: I would ask for a couple of weeks.

THE COURT: You can start off with People versus Finn (Phonetic spelling), 73 Misc., which is a fairly recent case, N.Y. sub 2d, 266. I am sorry. 73 Misc., 266. In that case they cite the most of the other cases that are relevant, and if you want to give me a memorandum, I'd appreciate that.

How much time do you want?

MR. WELKES: I'd like two weeks.

THE COURT: July 15th, in Part 21, where I will be sitting. That is Kew Gardens.

Same bail conditions.

COURT CLERK MANCHER: Same bail conditions. Remand the defendant.

Decision reserved on the motion.

THE COURT: People versus Finn, 73 Misc., 2d, 266.

[Certificate of Official Court Reporter Omitted]

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
HF/rb CRIMINAL TERM, PART XXI

THE PEOPLE OF THE STATE OF NEW YORK

—against—

OBIE RIDDICK, DEFENDANT

BY WILLIAM C. BRENNAN, J.

DATED July 15, 1974

Ind. No. 8072/74

DECISION OF THE SUPREME COURT,
QUEENS COUNTY,
ON MOTION TO SUPPRESS

The defendant moves for an order suppressing heroin and a hypodermic instrument seized in his apartment in a search made after an arrest on another charge.

On June 13, 1974, a hearing was held to determine if such evidence should be suppressed.

Based on the credible evidence adduced at that hearing, the Court makes the following findings of fact and conclusions of law:

During the course of an investigation into two armed robberies by Detective Fred Bisogno, the defendant was identified by the complainants as the perpetrator. On March 14, 1974, at about 12:00 noon, Bisogno accompanied by Detective Ferrick, Burnside and Parole Officer Tinner, went to the defendant's residence at 127-08 165th Street, County of Queens. Parole Officer Tinner entered the apartment and later emerged, signalling the detective that the defendant was inside. It is unclear from the evidence whether Riddick was on probation at this time. Upon receiving the signal, Detective Bisogno knocked on the apartment door which was opened by

the defendant's three year old son. Through the open door, the officer observed the defendant in his bedroom sitting in bed covered to the waist by a sheet. Entering the apartment with Detective Ferrick, Bisogno announced his authority and asked the defendant if he was Obie Riddick. When the defendant answered "yes", the officer told him he was under arrest and informed him of his rights. Riddick was then told to get out of the bed. When the defendant complied with the request, the detective noted that he was unclothed except for a pair of jockey shorts. After Obie Riddick exited from the bed, Bisogno searched the bed and a chest of drawers two feet from the bed and the defendant's clothing while Riddick dressed. In the top drawer of the chest the officer found the physical evidence which the defendant seeks to have suppressed. In response to defendant's counsel's question "did you have any apprehension that this defendant would be armed", the officer replied "yes".

Based on the credible facts adduced at the hearing, the Court reaches the following conclusions of law:

For this search and seizure to be reasonable within the meaning of the Fourth Amendment, two tests must be met. First: is the arrest here a lawful one? Second: if the arrest was lawful, did the search and subsequent seizure exceed the bounds set forth in *Chimel* v. *California* (395 U.S. 766)?

Under section 140.10(1)(b) of the Criminal Procedure Law, a police officer may make a warrantless arrest where that officer has reasonable cause to believe that the person he is arresting committed the crime for which he is being arrested whether or not such crime was committed in that officer's presence. It is clear from the facts of this case that in the course of Detective Bisogno's investigation of two robbery complaints, the defendant Obie Riddick was identified by the victims as the perpetrator. It follows then that the officer had reasonable cause to believe that Obie Riddick had committed the crime for which he was arrested. (*People* v. *Feldt*, 26 A D 2d 743, affd. 22 N Y 2d 839).

A search may be unlawful even though made incidental

to a valid arrest. (*Chimel* v. *California*, *supra*). In *Chimel* the United States Supreme Court said:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

In the case at bar, the officers arrested a suspect who had been accused of the commission of several armed robberies. They found the defendant in a state of undress. It was reasonable to anticipate that in order to clothe himself that the defendant would have to go into the chest of drawers. It was not unreasonable for them to anticipate that a person they reasonably believed to be an armed robber might have a weapon concealed in that chest of drawers. Additionally, the chest was only two feet from the bed and well within the area from which the defendant might gain possession of a weapon. The detective also testified that he searched the bed in which he found the defendant and Riddick's clothing while the defendant dressed. The search had as its objective the recovery of any weapon the defendant might have used to effect an escape and took place within an area from which the defendant might recover a

weapon. The search and seizure here were reasonable within the meaning of the Fourth Amendment.

In the course of the hearing the defendant's counsel raised the point of the presence of Parole Officer Tinner. While it is true that in a search by a parole officer, a parolee is subject to a search that would be impermissible in the ordinary situation (*People* v. *Randazzo*, 15 N Y 2d 526; *People* v. *Thompson*, N.Y.L.J. March 18, 1974, p. 15, col. 3), there is no evidence in this case to show that Tinner made any search or that the police attempted to use him as an agent to avoid the restrictions placed on them by the Fourth Amendment.

Order entered accordingly.

The clerk of the Court is directed to mail a copy of the order and decision to the attorney for the defendant.

/s/ [Illegible]
J. S. C.

DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. OBIE RIDDICK, Appellant.—Appeal by defendant from a judgment of the Supreme Court, Queens County, rendered September 24, 1974, convicting him of criminal possession of a controlled substance in the sixth degree, upon his plea of guilty, and imposing sentence. The appeal also brings up for review an order of the same court, dated July 15, 1974, which denied defendant's motion to suppress physical evidence. Judgment and order affirmed. No opinion Hopkins, Acting P.J., Damiani and Hawkins, JJ., concur; Cohalan, J., dissents and votes to reverse the judgment and order, grant the motion to suppress, and dismiss the indictment, with the following memorandum: In June, 1973 the victims of an armed robbery identified the defendant, through his photograph, as the perpetrator. Riddick was already a felon, having been convicted as one in 1970. There is some doubt as to whether the police knew of his whereabouts in June, 1973, but they admittedly knew his address in January, 1974. The arrest, effected without a warrant, was made on March 14, 1974. No attempt was made during the nine-month interval to present the case to a Grand Jury, or even to file an accusatory instrument. Nor was there any compelling reason to seek him out on March 14, 1974 without having first obtained an arrest warrant. In any event, the police officers verified the defendant's presence in his home by first sending in the defendant's parole officer. (Incidentally, defendant's sentence for the 1970 felony expired on February 12, 1974.) They then knocked at defendant's door. It was opened by the defendant's three-year-old child. There is no evidence that the defendant gave consent to the intrusion by the police (see *People* v. *Whitehurst*, 25 NY2d 389; *Bumper* v. *North Carolina*, 391 US 543); it would be farcical to suggest that the child gave the officers permission to enter the apartment (see *People* v. *Gonzalez*, 39 NY2d 122). In *Gonzalez* a consent was coerced from the defendants. Commenting on the fact

situation, Chief Judge Breitel wrote (p 129): "Another factor to be considered in determining the voluntariness of an apparent consent is the background of the consenter [citations omitted]. A consent to search by a case-hardened sophisticate in crime, calloused in dealing with police, is more likely to be the product of calculation than awe. Here, the Gonzalezes were both under 20 years of age and were newlyweds of three days. They had had very limited prior contact with the police. Under these circumstances, the ineluctable inference, except to the jaded, is that the consents could not be, on any creditable view of the agents' testimony, the product of a free and unconstrained choice." As with the Gonzalezes, the three-year-old could scarcely qualify as a sophisticate. When the door was opened one of the police officers saw the defendant lying in his bed. The officers entered the apartment, roused the defendant and announced their authority and purpose. In a search incident to the arrest, a controlled substance was found and seized. CPL 120.80 (subd 4) mandates that, in order to make an arrest, an officer can effect entry into a suspect's premises only after announcing his authority and purpose. At bar the officers first entered—without permission—and then announced their authority and purpose. Their failure to observe the statutory provision makes the arrest invalid (see *People* v. *Frank*, 35 NY2d 874, revg 43 AD2d 691 on the dissenting memorandum; *People* v. *Floyd*, 26 NY2d 558). Since the arrest was unlawful, any evidence seized during a search pursuant thereto must be suppressed.

OPINION OF THE NEW YORK COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

THEODORE PAYTON, APPELLANT

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

OBIE RIDDICK, APPELLANT

Argued April 28, 1978; decided July 11, 1978

JONES, J.

[1] We hold that an entry made for the purpose of effecting a felony arrest within the home of the person to be arrested by a police officer who has entered without permission of the owner, if based on probable cause, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances.

Defendant Theodore Payton has been convicted on a jury's verdict of the felony murder of a service station manager in connection with an armed robbery committed on the morning of January 12, 1970 by a man carrying a rifle and wearing a ski mask, who fled the scene with the weapon and cash following the homicide. Two days later, on January 14, two eyewitnesses to the crime—both of whom had known defendant—identified him to the police as the killer. One of the witnesses also furnished defendant's address. On the morning of January 15 about 7:30 A.M., without having first secured a warrant, the detective in charge of the investigation went with three other detectives and a police sergeant to defendant's apartment. Although they observed a light

shining beneath the door and heard a radio playing, there was no answer when they knocked. To open the locked metal door they summoned officers from the Emergency Service Department, who arrived about a half hour later and with the aid of crowbars forced open the door. The police entered the apartment, checked the rooms for defendant who was not found, observed a .30 caliber shell casing in plain view on top of a stereo set and then conducted a full-scale search of the apartment, which revealed a shotgun with ammunition in a closet and a sales receipt for a Winchester rifle and photographs of defendant with a ski mask in a dresser drawer. The following day defendant surrendered himself to the police and was subsequently indicted on charges arising out of the service station homicide.

Following a pretrial suppression hearing, the court, on concession by the District Attorney, suppressed all of the items found in the apartment with the exception of the shell casing. The suppression court held that the casing had been inadvertently observed while the police were lawfully in the premises to make a warrantless arrest for a felony which they had reasonable grounds to believe defendant had committed.[1]

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[1] Sections 177 and 178 of the Code of Criminal Procedure, in effect at the time of this entery, provided:

"§ 177. In what cases allowed.

"A peace officer may, without a warrant, arrest a person.

"1. For an offense, committed or attempted in his presence, or where a police officer as enumerated in section one hundred fifty-four-a of the code of criminal procedure, has reasonable grounds for believing that an offense is beng committed in his presence.

"2. When the person arrested has committed a felony, although not in his presence;

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

"4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

"5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code."

"§ 178. May break open a door or window, if admittance refused.

"To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."

During the trial the People produced testimony that two .30-30 Winchester discharged shell casings had been found at the scene of the crime and that those shells and the .30 caliber shell casing found in defendant's apartment had been fired from the same rifle. They also called as a witness the owner of a sporting goods store in Peekskill, New York, the store which had issued the rifle sales receipt seized at the time of defendant's arrest but suppressed prior to trial. He testified that on November 19, 1969 he had sold a .30-30 Winchester rifle and shells to a man who identified himself as Theodore Payton. There was also introduced in evidence the Federally required Firearm Transaction Record retained by the seller which bore defendant's signature. The defense objected to both the testimony and the exhibit as inadmissible "tainted fruit" of the unlawful seizure of the suppressed sales receipt. The objections were overruled and, after a posttrial hearing on defendant's motion to set aside the verdict on the ground that the evidence at trial was the product of material which had been ordered suppressed, the motion was denied. The Appellate Division affirmed defendant's conviction of felony murder.

Defendant Obie Riddick has been convicted of criminal possession of a controlled substance in the sixth degree on his plea of guilty following denial of his motion to suppress a quantity of narcotics and a hypodermic syringe taken from a dresser drawer in his home when he was arrested there on March 14, 1974 for the commission of two armed robberies which had occurred in 1971. In June, 1973 the victims had identified defendant from a photograph as the perpetrator of the robberies. Following that identification, the detective investigating the robberies contacted defendant's parole officer and in January, 1974 learned his address. With-

out having procured an arrest warrant, about noon on March 14, 1974 the detective, two other detectives and the parole officer went to the house where defendant was living. After the parole officer had entered the house, determined that defendant was present and so signaled the waiting policemen, the detective investigating the robberies knocked on the door, which was opened by defendant's three-year-old son. Through the open door the detective observed defendant in the bedroom sitting in bed covered to the waist by a sheet. Entering the apartment with one of the other officers, the detective announced his authority and asked defendant if he was Obie Riddick. Defendant acknowledged his identity and was told that he was under arrest, advised of his rights and instructed to get out of bed. When it then became apparent that defendant was dressed only in his underwear and that he would have to dress, the detective searched the bed, a chest of drawers two feet from the bed and the defendant's clothing. In doing so he found a quantity of narcotics and a hypodermic syringe in the top drawer of the chest. After indictment for the crimes of criminal posssesion of a controlled substance in the fifth degree and criminal possession of a hypodermic instrument defendant moved to suppress the drugs and syringe, contending that the arrest had been unlawful because it had been made without a warrant and without announcement by the police of their purpose before entering defendant's home.[2] The motion was

[2] CPL 140.15 provides with respect to arrest without a warrant: "4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

Subdivisions 4 and 5 of section 120.80 provide:

"4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

"(a) Result in the defendant escaping or attempting to escape; or

"(b) Endanger the life or safety of the officer or another person; or

"(c) Result in the destruction, damaging or secretion of material evidence.

"5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary."

denied after a hearing, the suppression court finding that the arrest was lawful because it was based on probable cause and that the search conducted incidental to the arrest was reasonable and did not exceed the limits set out in *Chimel* v. *California* (395 US 752). Defendant's contentions were not explicitly addressed. A plea of guilty to a reduced charge in satisfaction of the indictment followed the denial of suppression. The conviction was affirmed at the Appellate Division.

In each of these cases we are confronted with the claim that evidence, the introduction or availability of which may be regarded as critical to defendants' convictions, should have been suppressed because it had been unlawfully procured, that is, seized after an entry into defendant's home to make an arrest without either the authority of a previously issued warrant or the existence of exigent circumstances, in violation of constitutional protections. In Payton the challenge is to the .30 caliber shell casing found on defendant's stereo set which—matching those found at the service station—may well have contributed to identify defendant as the killer in the jury's eyes; in Riddick it is to the narcotics and hypodermic syringes, denial of suppression of which prompted defendant's plea of guilty. In Riddick reliance is also placed on the absence of compliance with a statutory requirement of prior announcement of the police officers' authority and purpose.

The parties to these appeals have extensively briefed the question whether, without infringement of constitutional rights, an arrest may be made within the residence of a defendant based on unquestionable probable

cause—as each of these arrests was—without a warrant in the absence of exigent circumstances. Not insubstantial arguments are mounted in support both of an affirmative and a negative response to the question, and multiple supporting authorities are offered on each side. It is contended by defendants that physical invasion of the home is the "chief evil against which the wording of the Fourth Amendment is directed" (*United States* v. *United States Dist. Ct.*, 407 US 297, 313); that it has been conclusively determined that, absent exigent circumstances (of which there were none here), an otherwise proper warrantless entry of the home to search for property is impermissible (*Coolidge* v. *New Hampshire*, 403 US 443); that the sanctity of the home is equally invaded when entry is made for the purpose of arrest; that the more serious consequences of the latter class of entry provide a more compelling reason to require the authority of a warrant in such a situation (*United States* v. *Reed*, 572 F2d 412; *Accarino* v. *United States*, 179 F2d 456)—in sum, that if a warrant or exigent circumstances is required for a search and seizure, any proper sense of constitutional symmetry would mandate that the same predicate be required for an arrest.

The People, for their part, assert the existence of an established difference between entry in a home to effect an arrest and on to search and seize property (as to which they agree that a warrant is required in the absence of exigent circumstances), and urge that a proper regard for public safety permits—even demands—recognition of a right in a peace officer to enter a home for the purpose of arresting one who the officer has reasonable grounds to believe has committed a felony, without the necessity for obtaining a warrant, even though there be no exigent circumstances. They contend that the right to make such an arrest, as an alternative to arrest with a warrant, has been recognized both at common law before the adoption of the constitutional provisions and since their adoption, and that such procedure is presently authorized by explicit legislation in at least 30 States, including New York, as well as by the Model

Code of Pre-Arraignment Procedure promulgated by the American Law Institute (§ 120.6, subd [1]).

[2] The parties also draw the conflicting inferences (which others have similarly drawn) from holdings and writings of the Supreme Court of the United States and its individual Justices. Defendants infer from *United States* v. *Watson* (423 US 411) that an arrest following a warrantless entry in the home is invalid; the People conclude from *Ker* v. *California* (374 US 23) that the contrary is the case. The fact is that the Supreme Court has not yet resolved the issue, as appears from the explicit statement in the plurality opinion in *Watson* that the question "'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest'" is "still unsettled" (423 US, at p 418, n 6). Nor has the issue been resolved in our court. In determining now that the warrantless arrests effected in these cases did not violate defendants' constitutional rights to be free from unreasonable searches and seizures, we rely both on what we perceive to be a substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of making an arrest, and on the significant difference in the governmental interest in achieving the objective of the intrusion in the two instances.

In the case of the search, unless appropriately limited by the terms of a warrant, the incursion on the householder's domain will be both more extensive and more intensive and the resulting invasion of his privacy of greater magnitude than what might be expected to occur on an entry made for the purpose of effecting his arrest. A search by its nature contemplates a possibly thorough rummaging through possessions, with concurrent upheaval of the owner's chosen or random placement of goods and articles and disclosure to the searchers of a myriad of personal items and details which he would expect to be free from scrutiny by uninvited eyes. The householder by the entry and search of his residence is stripped bare, in greater or lesser degree, of the privacy which normally surrounds him in his daily living, and,

if he should be absent, to an extent of which he will be unaware.

Entry for the purpose of arrest may be expected to be quite different. While the taking into custody of the person of the householder is unquestionably of grave import, there is no accompanying prying into the area of expected privacy attending his possessions and affairs. That personal seizure alone does not require a warrant was established by *United States* v. *Watson* (423 US 411, *supra*), which upheld a warrantless arrest made in a public place. In view of the minimal intrusion on the elements of privacy of the home which results from entry on the premises for making an arrest (as compared with the gross intrusion which attends the arrest itself), we perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence. To the extent that an arrest will always be distasteful or offensive, there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable.

At least as important, and perhaps even more so, in concluding that entries to make arrests are not "unreasonable"—the substantive test under the constitutional proscriptions—is the objective for which they are made, viz., the arrest of one reasonably believed to have committed a felony, with resultant protection to the community. The "reasonableness" of any governmental intrusion is to be judged from two perspectives—that of the defendant, considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action. The community's interest in the apprehension of criminal suspects is of a higher order than is its concern for the recovery of contraband or evidence; normally the hazards created by the failure to apprehend far exceed the risks which may follow nonrecovery.

The apparent historical acceptance in the English common law of warrantless entries to make felony arrests (2 Hale, Historia Placitorum Coronae, History of

Pleas of Crown [1st Amer ed, 1847], p 92; Chitty, Criminal Law [3d Amer, from 2d London, ed. 1836] 22-23), and the existence of statutory authority for such entries in this State since the enactment of the Code of Criminal Procedure in 1881[3] argue against a holding of unconstitutionality and substantiate the reasonableness of such procedure. In *People* v. *Samuel* (29 NY2d 252, 264) we said: "While antiquity is not an infallible criterion for determining the scope of constitutional rights, traditional usage and understanding is helpful in defining the privilege against self incrimination." That rationale is even more persuasive when we are determining "reasonableness"—a quality, not always constant, which reflects and derives substance from the standards and mores of the time and the society.

Nor do we ignore the fact that a number of jurisdictions other than our own have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest.[4] The American Law Institute's Model Code of Pre-Arraignment Pro-

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[3] Sections 177 and 178 of that statute provided as follows:

"§ 177. * * *

"A peace officer may, without a warrant, arrest a person,

"1. For a crime, committed or attempted in his presence;

"2. When the person arrested has committed a felony, although not in his presence;

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it".

"§ 178. * * *

"To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."

These sections remained unchanged, except for expansion of the grounds for warrantless arrest provided in section 177 by amendments in 1960, 1963 and 1967, until replaced by the Criminal Procedure Law on September 1, 1971. The substance of the provisions was continued and expanded in sections 140.10, 140.15 (subd 4) and 140.25 (subds 1-3) of the present statute.

[4] American Law Institute, Model Code of Pre-Arraignment Procedure (1975) Commentary, Appendix XI.

cedure makes similar provision in section 120.6, with suggested special restrictions only as to nighttime entries. The accompanying commentary states: "To go further and require a warrant or a showing of necessity before police may make a felony arrest on private property even in daytime seems unduly restrictive. Moreover, apart from the specially alarming quality of nighttime entries and apart from search considerations, it is far from clear that an arrest in one's home is so much more threatening or humiliating than a street arrest as to justify further restrictions on the police." (American Law Institute, Model Code of Pre-Arraignment Procedure [1975], p 307).

[1] For these reasons and in the absence of an explicit determination by the Supreme Court which would permit us no alternative, we hold that the entries made by the police in the cases before us did not violate defendants' constitutional protections against unreasonable searches and seizures. In reaching this conclusion we are not unmindful of considered decisions in the Federal courts which have reached an opposite result (*e.g.*, *United States* v. *Reed*, 572 F2d 412, *supra; United States* v. *Killebrew*, 560 F2d 729).

[3] We turn then to the other contentions made in Payton. First, it is argued that the true purpose of the police officers who entered defendant's apartment was not to make an arrest but rather to conduct a full-blown search of the premises, in which event the plain view doctrine would not be applicable and the shell casing too should have been suppressed. The determination of the officers' purpose, however, turned on a question of fact, the resolution of which was dependent on the credibility ascribed by the hearing Judge to the testimony of the entering officer. That factual issue, having been resolved in favor of the People by the suppression court and affirmed at the Appellate Division, is now beyond review by this court.

Next, Payton renews his challenge to the admissibility of the testimony of the Peekskill sporting goods store owner and of the latter's gun sale record as tainted fruit of the initial unlawful seizure of the gun sale receipt

which occurred when defendant's apartment was illegally searched. To refute defendant's claim that, but for the seizure of the sales receipt, the prosecution would not have gained access to the testimony or the record, the People assert (as the trial court found after the posttrial hearing) that the allegedly tainted evidence was admissible under the so-called "inevitable discovery" doctrine (cf. *People* v. *Fitzpatrick*, 32 NY2d 499). Defendant responds that the factual situation here was insufficient to support the application of that doctrine. The evidence, however, is to the contrary.

[4, 5] In the first place the label "inevitable discovery" is inaccurate and therefore misleading. The doctrine does not call for certitude as the literal meaning of the adjective "inevitable" would suggest. What is required is that there be a very high degree of probability that the evidence in question would have been obtained independently of the tainted source. The proof in this case meets that standard and supports the finding of the Trial Judge at the posttrial hearing. Second, any and every application of the doctrine of inevitable discovery will inescapably be exposed to the observation that the police did not in fact pursue the inevitable course to discovery.

The investigating detective testified that, because the murder weapon was never recovered, proof of defendant's ownership of a gun such as that used in the killing was of critical importance. The detective knew that the weapon used was a Winchester rifle. He also testified that he had learned from a friend and hunting companion of defendant that the latter had purchased such a gun in "upstate New York" in November, 1969. He further stated without contradiction—and this was critical in this instance—that it was "normal police procedure" in investigations such as this to communicate with the Tobacco, Alcohol and Firearms Unit of the United States Treasury Department, which maintains a list of all gun shops, and then to send out communications to and to make personal contacts with such shops

in an effort to locate the weapon sought.[5] He stated that in this instance he would have followed this procedure and would have inquired of gun stores, which would have included the one in Peekskill. Inquiry at the Peekskill store would have led directly to defendant because of the records of all gun sales maintained under Federal requirement. In corroboration the owner of the Peekskill store testified that he maintained the required records of gun sales and that he was accustomed to checking his records when police inquiries were made. The Trial Judge found that the People had established "that normal police investigative techniques would have uncovered the Peekskill gun dealer" and thus that "the unlawful seizure of the bill of sale was not a *sine qua non* of the discovery" of the seller. We agreed.[6]

[6] Finally, it is asserted that defendant was deprived of his constitutional right to represent himself at his trial. The exercise of this right requires an unequivocal request to proceed *pro se* (*People* v. *McIntyre*, 36 NY2d 10, 17), which was lacking in this case. Statements made by defendant as to his being his own lawyer were associated with references to discharging his assigned counsel and securing new representation and were always overshadowed by applications for adjournments and postponements for reasons which he declined to divulge. At no time did he demonstrate an actual fixed intention and desire to proceed without professional assistance in his defense to the charges against him.

[7] It remains only briefly to address the other contention advanced in Riddick—that the police entry was statutorily invalid for the failure of the police officers

[5] When the cross-examiner resorted to the "reductio ad absurdum", the officer readily admitted that he had never known any such inquiry to include every gun shop in the State. There was, however, no contradiction of his testimony as to the normal police procedure in making such investigations.

[6] As to the possible alternative ground for reaching this conclusion, namely, that the testimony of the keeper of the gun shop was admissible under the attenuation rule with respect to the testimony of live witnesses, see *People* v. *Mendez* (28 NY2d 94) (compare, also, *United States* v. *Ceccolini*, —— US ——, 46 USLW 4229).

to give notice of their authority and purpose prior to their entry to make the arrest. The requirement that such notice be given before breaking into a building to obtain access to effect an arrest is of ancient vintage and serves the purpose of providing the person within an opportunity to respond to the demand for admittance, thus obviating the need for forcible entry (*Miller* v. *United States*, 357 US 301). The statement of the purpose demonstrates the inapplicability here of the statutory section in effect at the time in question which codified the common-law requirement.[7] In Riddick the purpose of the notice requirement was accomplished when, in response to the investigating officer's knock, defendant's infant son opened the door, and promptly on entering the officers declared their authority and their purpose to arrest defendant. What is determinative is that the entry was peaceable. No forcible entry was necessary or effected and no prejudice resulted from the officers' failure to give notice outside the open door.

Accordingly, for the reasons stated, the order of the Appellate Division in each case should be affirmed.

WACHTLER, J. (dissenting). For the reasons stated by Judge COOKE in his dissenting opinion I too would hold that the police need a warrant to enter a home in order to arrest or seize a person, unless there are exigent circumstances. Thus in the Riddick case where there was no exigency I would reverse, suppress the evidence and dismiss the indictment. In the Payton case I would reach substantially the same result as Judge COOKE proposes, but for somewhat different reasons.

Initially it seems to me that in the Payton case the circumstances were sufficiently compelling to permit the police to enter the defendant's apartment to arrest him without a warrant. The record shows that from the time of the murder the police had actively sought the killer. As a result of their continuous and intensive investigation they soon identified the defendant, two days after the crime, and early the following morning went

[7] CPL 120.8 (subd 5) (*supra*, n. 2).

to his apartment. There they observed a light shining beneath the door and heard a radio playing. Thus for several days the police had been in continuous pursuit of the killer when they arrived at the defendant's apartment, where they had reason to believe he might be hiding, particularly in view of their observations at the scene. Under these circumstances I believe it was reasonable for the police to continue their pursuit into the apartment in order to take a dangerous killer into custody (cf. *People* v. *Fitzpatrick*, 32 NY2d 499, 509).

But the right to enter for the limited purpose of arresting the defendant did not justify a full-scale search of the defendant's apartment for evidence of the crime. The People commendably admitted this at the hearing and the court suppressed all of the evidence seized, except for the shell casing which was found in plain view. I agree with that determination. But I cannot agree with the court's further holding that certain fruits of the illegal search—namely, the records of a Peekskill gun dealer whose name appeared on a receipt seized during the search—was properly admissible under the so-called "inevitable discovery" doctrine, on the theory that the police would have discovered this evidence in any event through normal police procedures.

The inevitable discovery doctrine is unrealistic in the purest sense. It permits the court to ignore what really happened and to rely instead on hypothesis. In this case for instance the police admitted that they did, indeed, obtain the gun shop records as a direct result of the illegal seizure of the gun receipt and that the evidence was therefore a classic example of poisoned fruit. Nevertheless ignoring the reality of the direct connection the court held that the evidence was not tainted because the police would, or should, have obtained it in the normal course of their investigation although they had made no effort to do so.

Apart from being completely unrelated to what really happened, this determination must, on the facts of this case, rest on pure conjecture. Without the receipt the only information the police had which could have led them to the record of the gun sale was a statement from

the defendant's friend and hunting companion that the defendant had purchased a weapon, similar to the one sought, in "upstate New York" in November, 1969. Furthermore, although it was noted that the Federal Government requires gun dealers to make a record of their sales, it was conceded that these records are not sent to any central repository. Thus the police could not obtain a record of the sale from the Federal Government. The Federal authorities could only furnish a list of all registered gun dealers in the State. The police would then have to contact every dealer individually to see if a record had been made and was still available.

At the hearing one of the officers testified that at the time there were approximately 1,100 gun dealers registered in the State. The record does not indicate how many of these dealers were located in the New York City area, which presumably could have been eliminated from the search. But even eliminating these dealers the task of locating the record of the sale would have involved a considerable effort. In fact it would have involved such an effort that the police officers themselves admitted that they could not recall a single instance where an investigation of this nature and magnitude had been undertaken. Of course they had not actually employed this approach in this case. Thus the determination that the police would have discovered the sale record in the normal course of their investigation, through communications with gun dealers, does not rest on experience, nor does it even rest on proof of a normal police procedure. As far as this record shows this type of investigation was neither tried nor proven and would have been quite extraordinary.

This is not the type of inevitability which was contemplated in *Fitzpatrick* (*supra*, at p 507) where the court repeatedly noted that discovery of the evidence was "certain" and the police had only to look in "the next most reasonable place". Here then were literally hundreds of reasonable places to look, most of which were widely scattered throughout the State.

Apparently the majority recognizes the difficulty of holding that the police would have inevitably prevailed in the face of so many obstacles. Accordingly they have redefined the inevitable discovery doctrine by holding that it does not actually require "certitude" as the term itself implies, and we held in *Fitzpatrick*. It simply requires "a very high degree of probability that the evidence in question would have been obtained independently of the tainted source." Now apparently the only thing inevitable about the inevitable discovery doctrine is that the police with the benefit of hindsight, will inevitably be able to show that they could have obtained the evidence lawfully by employing some other technique, no matter how hypothetical and no matter how involved or extraordinary resort to the procedure would have been.

This type of reasoning can only serve to erode the exclusionary rule. In many, if not most cases, the police will undoubtedly be able to point to some lead which if pursued with fanatical devotion would have ultimately led them to the evidence which was actually obtained unlawfully. Unfortunately it is in cases where the evidence could have been obtained through lawful, but time-consuming methods that the exclusionary rule is most needed to discourage the police from resorting to the unconstitutional short cut (see Pitler, Fruit of the Poisonous Tree, 56 Cal L Rev 579, 630).

The mischief caused by the "inevitable" or "very highly probable" discovery doctrine is well illustrated in the case now before us. Here the majority has held that the police may enter a home without a warrant to make an arrest although they concededly could not have entered to make a search. The theory is that an entry to arrest is less intrusive than a search because it does not involve a wholesale rummaging through the individual's belongings. Yet, despite the fact that the police did in fact completely rummage through the defendant's apartment and belongings after entering to make the arrest, the majority holds that the police should not be deprived of the illegal fruits because the evidence would have been discovered in any event in the normal course of the police investigation. This decision can

hardly be expected to discourage the police from completely searching the premises for evidence after entering for the "limited" purpose of making an arrest. Thus in this case the inevitable discovery doctrine has even undermined the basic premise on which the majority relies to support its conclusion that an entry to make an arrest is significantly different from an entry to search for evidence.

Accordingly, in the Payton case, I would reverse and suppress all evidence of the purchase of the weapon.

FUCHSBERG, J. (dissenting). I too would reverse in each of these cases.

My deepening concern over the proliferation of rationales which erode the protection the warrant requirement was intended to provide against illegal governmental intrusions on the privacy of home and person puts me at one with Judge COOKE in what he says so well on that subject today. (See, also, Younger, Constitutional Protection on Search and Seizure Dead? 3 Trial, Aug.-Sept., 1967, at p 41.)

But on the matter of "inevitable discovery" and the role it plays in the Payton case in particular, while my views are in harmony with the analysis on which Judge WACHTLER would dispose of that issue here, I would add some thoughts of my own.

Though hardly universally accepted (see *Fitzpatrick* v. *New York*, 414 US 1050 [WHITE, J., dissenting from denial of certiorari]), the "inevitable discovery" exception to the exclusionary rule commended itself to those with whom it originally won favor largely because conceptually it was to apply in factual contexts which, in spirit, if not in dictionary definition, bespoke "inevitability". Thus, while I appreciate the majority's reluctance to continue a commitment to a definition which calls for the certitude, if not predestination, connoted by a literal reading of the word "inevitable", it seems to me that the shift the majority today makes to one which talks only in terms of a *degree* of "probability" undermines its validity.

No matter how sincerely employed, hindsight rationalization of a train of events that never actually took place is bound to be weighted down with subjective factors difficult to appraise or disprove. Consequently, it would almost always be possible to make a colorably persuasive argument that the illegally discovered evidence would have been turned up in any event.

It follows that the sidestepping of constitutional safeguards will become all too easy—as is well illustrated by Judge WACHTLER'S revealing recital of the Payton facts—unless the People, when relying on "inevitable discovery", are made to meet that burden of proof which, short of certainty, is most demanding and most comprehensible. Therefore, if, as a predicate for the invocation of inevitable discovery, we are to move to an avowed standard short of true "inevitability", it should be to one that asks no less than proof that lawful discovery would have taken place beyond a reasonable doubt.

The legal distinctions among our varied standards of proof are too often honored in their semantics rather than in their substance (see 9 Wigmore, Evidence [3d ed], § 2497). No doubt this is because they are easier to articulate than to apply. But, at least, the ingrained familiarity which the concept of proof beyond a reasonable doubt enjoys among the members of our society—repeatedly intoned as it is in the determinations of guilt or innocence under our system of criminal justice—affords immeasurably more assurance of strict application of its language than we can count on in the verbalistic shadowland where words and phrases such as "preponderance", "satisfactory", "clear and convincing", "reasonable certainty" and now "high degree of probability" too often are forced to dwell.

COOKE, J. (dissenting). Today, the majority of this court holds that in the absence of exigent circumstances, the police may enter the home of a suspect, whether by force or simply without his consent, in order to effect an arrest for a felony for which they have probable cause but no warrant.

In so doing, the court leaves the law of this State in an anomalous state of flux: the Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant except in carefully circumscribed instances (*Katz* v. *United States*, 389 US 347, 357); yet, in the case of an arrest of a person, where the invasion of personal privacy interests is that much greater, the protections afforded by the amendment may be cast aside based solely upon the arresting officer's subjective notion of probable cause. Thus, while a citizen's guarantee to be free from unreasonable governmental intrusion constitutes the heart of the Fourth Amendment, the bifurcated standard between search and arrest announced today accords an individual's bare possessions a greater quantum of protection than his very person, reviving the values of an era in which property interests were exalted over personal liberties.

Surprisingly, the Supreme Court has yet to confront the question of whether the police may arrest a man in his home—in the absence of exigent circumstances without a warrant (see, e.g., *United States* v. *Santana*, 427 US 38; *Jones* v. *United States*, 357 US 493, 499-500), but has, nevertheless afforded valuable insights as to its proper resolution. Thus, in *Coolidge* v. *New Hampshire* (403 US 443), Justice STEWART, writing for the majority and responding to Justice WHITE'S statement in dissent, stated: "It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.' * * * If we were to accept MR. JUSTICE WHITE'S view that warrantless entry for purposes of arrest * * * [is] *per se* reasonable, so long as the police have probable cause, it would be difficult to see the basis for distinguishing searches of houses and seizures of effects. * * * If we were to agree with MR. JUSTICE WHITE that the police may, whenever they

have probable cause, make a warrantless entry for the purpose of making an arrest * * * then by the same logic *any* search or seizure could be carried out without a warrant, and we would simply have to read the Fourth Amendment out of the Constitution" (*id.*, at pp 477-480; see, also, *Warden* v. *Hayden*, 387 US 294; *Davis* v. *Mississippi*, 394 US 721, 728; *Wong Sun* v. *United States*, 371 US 471, 480-481).

Although the point has not been squarely adjudicated since *Coolidge* (see *United States* v. *Watson*, 423 US 411, 418, n 6), its proper resolution, it is submitted, is manifest. At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed (see, e.g., *Boyd* v. *United States*, 116 US 616, 630; *Camara* v. *Municipal Ct.*, 387 US 523, 528). To achieve that end, the framers of the amendment interposed the warrant requirement between the public and the police, reflecting their conviction that the decision to enter a dwelling should not rest with the officer in the field, but rather with a detached and disinterested Magistrate (*McDonald* v. *United States*, 335 US 451, 455-456; *Johnson* v. *United States*, 333 US 10, 13-14). Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control any contemplated entry, regardless of the purpose for which that entry is sought. By definition, arrest entries must be included within the scope of the amendment, for while such entries are for persons, not things, they are, nonetheless, violations of privacy, the chief evil that the Fourth Amendment was designed to deter (*Silverman* v. *United States*, 365 US 505, 511).

The court reaches its conclusion that a warrant is not required for a police officer to enter a private home and effect an arrest therein, so long as he has probable cause to believe that a felony has been committed on a number of factors, none of which, it is submitted, supports its holding. Reasoning that the intrusion which attends entry into the home to effect a warrantless arrest is

somehow less egregious than entry to conduct a search, the majority simply reads the warrant requirement out of the Fourth Amendment. Even if one were to accept the conclusion that incursion for the purpose of arrest is less extensive than that for search (but see *Foley* v. *Connelie*, —— US ——, ——, 46 USLW 4237, 4239; *United States* v. *Watson*, 423 US 411, 428 [POWELL, J., concurring]; *Chimel* v. *California*, 395 US 752, 766 [WHITE, J., dissenting]), it is difficult to harmonize the constitutional dictate that any governmental intrusion into the sanctity of the home must be controlled by a neutral Magistrate with whatever actions the police may take after that intrusion is a *fait accompli*. Indeed, from the standpoint of the citizen—to whom the language of the Fourth Amendment is directed—it makes little difference whether the invasion of the privacy of his home was made to effect a warrantless arrest or a warrantless search (*Lankford* v. *Gelston*, 364 F2d 197, 205).

The police are constitutionally forbidden to enter and search an individual's home in the absence of exigent circumstances, even where there is no doubt that the object of the search is within (*Agnello* v. *United States*, 269 US 20, 32). Nevertheless, solely because of the officer's perception of probable cause this same individual may have his constitutional guarantee of privacy violated and may be exposed to arrest while still in his dwelling. The distinction is tenuous at best, for it may be said that an entry to arrest is simply a search for a person rather than a search for things (*Dorman* v. *United States*, 435 F2d 385, 390-391; *Commonwealth* v. *Forde*, 367 Mass. 798, 805) and that the arrest itself is "quintessentially a seizure" (*United States* v. *Watson*, 423 US 411, 428 [POWELL, J., concurring]). In short, the constitutional guarantee that assures citizens the privacy and security of their homes unless determined otherwise by a judicial officer, applies with equal force in the case of entry to arrest a suspect as it does in the case of entry to search for property (*United States* v. *Reed*, 527 F2d 412; *United States* v. *Killebrew*, 560 F2d 729; *United States* v. *Calhoun*, 542 F2d 1094; *United States* v. *Shye*, 492 F2d 886; *Vance* v. *North Carolina*, 432 F2d 984; *State* v. *Cook*,

115 Ariz. 188; *People* v. *Ramey*, 16 Cal. 3d 263, cert den 429 US 929; *People* v. *Wolgemuth*, 43 Ill. App 3d 335).

As the majority notes, proper resolution of these cases hinges on the balancing of two competing, but not necessarily irreconcilable, concerns:) the individual's interest in maximum security within his home, where he has a greater quantum of protection than in public (see *United States* v. *Watson*, *supra*; *People* v. *De Bour*, 40 NY2d 210), and the interest of the State in apprehending felons and maintaining an orderly society. As noted, the Fourth Amendment was drafted to secure the right of privacy against any arbitrary governmental intrusion by taking that decision away from the police and placing it with a neutral Magistrate. But the protections afforded by the amendment are not absolute; instead, they are governed by a standard of general reasonableness (*United States* v. *Rabinowitz*, 339 US 56, 70 [FRANKFURTER, J., dissenting]). In some instances where the exigencies of the moment will not tolerate the delay incident to obtaining a warrant, a warrantless entry and arrest will satisfy this ultimate standard of reasonableness (see, e.g., *Warden* v. *Hayden*, 387 US 294; *Ker* v. *California*, 374 US 23; *People* v. *Hodge*, 44 NY2d 553). In still others, an individual may simply be located in an area in which his reasonable expectations of privacy must be subsumed by the demands of the public weal. Thus, where an individual is exposed to public view, expectations of privacy are substantially diminished and warrantless arrests are reasonable (*United States* v. *Watson*, 423 US 411, *supra*; *Santana* v. *United States*, 427 US 38, *supra*).

But these are not cases where the exigencies of the circumstances would not brook delay or where the arrests were effected in a public place. When an individual is safely ensconced within the confines of his home, special considerations are brought to bear. It merits little repetition or citation of authority but to note that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" (*United States* v. *United States Dist. Ct.*, 407 US 297, 313). The sanctity of a private home is traditional to our Anglo-

Saxon heritage (Coke, Third Institutes, p 162), and the Constitution itself points to the proper procedure to be followed in intruding upon this precious sanctuary. That basic principle—the constitutional guarantee that, except in a few jealously guarded circumstances, assures citizens of the privacy and security of their own homes unless a judicial officer should determine otherwise—is applicable not only in cases of entry to search for and seize property, but in instances of entry to search for and seize a person as well. Indeed, the Fourth Amendment itself speaks of searches and seizures of both persons and property in indistinguishable terms. It is illogical at this juncture for the court "to pay homage to the considerable body of law that has developed to protect an individual's belongings from unreasonable search and seizure in his home, and at the same time assert that identical considerations do not operate to safeguard the individual himself in the same setting" (*People* v. *Ramey*, 16 Cal. 3d 263, 275, *supra*).

Nor would an onerous burden be placed upon the police by requiring them to obtain approval of a judicial officer prior to their nonconsensual entry into a suspect's home in the absence of extraordinary circumstances. On the contrary, what imposition of a warrant requirement would accomplish would be the minimization of nonconsensual entry into the home by overzealous police officers who may occasionally lose sight of the citizen's expectation of privacy. Thus, the warrant requirement would permit a neutral Magistrate to make the decision whether to authorize arrest, just as he must do in the search and seizure context, rather than leave this decision to the oft-times colored determinations of the police. As Justice JACKSON has noted (*Johnson* v. *United States*, 333 US 10, 13-14): "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's

disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

Lastly, the court relies on the existence of statutes and the American Law Institute imprimatur codifying the common-law rule authorizing warrantless arrests in private homes. To be sure, the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years, but neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented here (*see Brown* v. *Board of Educ.*, 347 US 483, 490-495; *Walz* v. *Tax Comm.*, 397 US 664, 678) and can never be a substitute for reasoned analysis.

Although I subscribe to the well-reasoned exegesis of Judge WACHTLER concerning the majority's misconception of the inevitable discovery rule, I cannot agree that the facts in the Payton case were so compelling as to allow the police to dispense with a warrant prior to their forcible entry into defendant's apartment. The police were well aware of defendant's identity and place of residence the day before their warrantless break in. In the intervening period they had ample opportunity to secure the approval of a detached judicial officer. Moreover, even on the day of the forcible entry, the police were compelled to delay even further while waiting for the arrival of officers from the Emergency Services Department—during which time they again could have secured the necessary warrant. Even barring that course of action, the police could simply have staked out the apartment while waiting for a judicial officer to authorize entry into the home. The difference between action which would have been constitutionally proper and that which was taken is not slight. Had the police in fact obtained a warrant, limiting the scope of their activities after entry, their patently illegal actions in conducting a full-blown search of the premises might have been avoided (cf. *Mincey* v. *Arizona*, —— US ——, 46 USLW 4737, 4739).

In sum, a serious incongruity between the Fourth Amendment protections applicable to search and arrest has now been created. If the guarantee afforded by the Fourth Amendment is to remain viable, the police must be required, in absence of exigency, to obtain a warrant from a disinterested judicial officer before invading domestic perimeters for whatever purpose. The abuses which might result from the holding of the majority are legion. Probable cause in the eyes of a police officer is a somewhat amorphous concept and the privacy of our citizenry is far too cherished a right to be entrusted to his discretion. Where there is no warrant authorizing entry into the home and no circumstances necessitating immediate police action, it is constitutionally imperative to preclude law enforcement officers from effecting a forcible or nonconsensual entry into the home to make a felony arrest.

Accordingly, I vote that the orders of the Appellate Division should be reversed and, in each case, a new trial granted.

Chief Judge BREITEL and Judges JASEN and GABRIELLI concur with Judge JONES; Judges WACHTLER, FUCHSBURG and COOKE dissent and vote to reverse and order a new trial in separate dissenting opinions.

In *People* v. *Payton*: Order affirmed.

Chief Judge BREITEL and Judges JASEN and GABRIELLI concur with Judge JONES; Judges WACHTLER and FUCHSBERG dissent and vote to reverse and dismiss the indictment in separate dissenting opinions; Judge COOKE dissents and votes to reverse and order a new trial in another dissenting opinion.

In *People* v. *Riddick*: Order affirmed.

COURT OF APPEALS
STATE OF NEW YORK

No. 259

[Filed Jul. 19, 1978]

The Hon. Charles D. Breitel, Chief Judge, Presiding

THE PEOPLE &C., RESPONDENT

vs.

THEODORE PAYTON, APPELLANT

REMITTITUR (Payton)

The appellant in the above entitled appeal appeared by William E. Hellerstein and William J. Gallagher, The Legal Aid Society; the respondent appeared by Robert M. Morgenthau, District Attorney of New York County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Jones, J. All concur except Wachtler, Fuchsberg and Cooke, JJ., who dissent and vote to reverse and order a new trial in separate dissenting opinions.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 11, 1978.

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

No. 258

THE PEOPLE &C., RESPONDENT

vs.

OBIE RIDDICK, APPELLANT

REMITTITUR (Riddick)

The appellant in the above entitled appeal appeared by David A. Lewis and William E. Hellerstein, The Legal Aid Society; the respondent appeared by John J. Santucci, District Attorney, Queens County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Jones, J. All concur except Wachtler and Fuchsberg, JJ., who dissent and vote to reverse and dismiss the indictment in separate dissenting opinions and Cooke, J., who dissents and votes to reverse and order a new trial in a dissenting opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 11, 1978.

SUPREME COURT OF THE UNITED STATES

Nos. 78-5420 and 78-5421

THEODORE PAYTON, APPELLANT

v.

NEW YORK; and

OBIE RIDDICK, APPELLANT

v.

NEW YORK

ON CONSIDERATION of the motions of the appellants for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motions be, and the same are hereby, granted.

December 11, 1978

SUPREME COURT OF THE UNITED STATES

Nos. 78-5420 and 78-5421

THEODORE PAYTON, APPELLANT

v.

NEW YORK; and

OBIE RIDDICK, APPELLANT

v.

NEW YORK

APPEALS from the Court of Appeals of the State of New York.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted limited to question 1 presented by the jurisdictional statement in No. 78-5420. Probable jurisdiction is noted in No. 78-5421. The cases are consolidated and a total of one hour is allotted for oral argument.

December 11, 1978

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